

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

**CONSOLIDATED CRIMINAL APPEAL NO 7/2021, 8/2021 AND
9/2021**

(Originating from Criminal Case No 107 of 2020 of the District Court Serengeti at Mugumu)

MUGENDI KENYEKA @ NG'OMBE 1ST APPELLANT
RICHARD NYAMBUNGA.....2ND APPELLANT
MUSA JAMES @ MASESE3RD APPELLANT

Versus

REPUBLIC RESPONDENT

JUDGMENT

18th October & 24th November 2021

Kahyoza, J:.

Mugendi s/o Kenyeka @ Ng'ombe, Richard s/o Nyambunga and **Musa s/o James @ Maseke** (1st appellant, 2nd Appellant and 3rd Appellant) was arraigned before the District Court of Serengeti charged with one offence of unlawful possession of government trophies. After full trial, Serengeti district court, found all appellants guilty, convicted and sentenced them to serve a custodial sentence of Twenty-Five (25) years.

Aggrieved, the appellants appealed to this Court, lodging separate appeals with the same grounds of appeal. We consolidated appeals. The appellant's grounds of appeal raised the following issues:-

1. Did the trial court err to rely on the tendered exhibits to convict the appellants?
2. Were the appellants denied an opportunity to call witnesses?
3. Were the appellants denied a chance to cross-examine the prosecution witnesses?

The District Court of Serengeti at Mugumu relied on the evidence of four prosecution witnesses to find all appellants guilty and convicted them with the offence of unlawful possession of Government Trophies, contrary to section 86 (1) and (2) (b) of the Wildlife Conservation Act, Cap. 283 (the **WLCA**) read together with paragraph 14 of the First Schedule to the Economic and Organized Crime Control Act, [Cap. 200, R.E. 2019]. Briefly the facts which led to the appellants' conviction were that; on 11th of November, 2019 Maro Muhongo Makuru (Pw1), Sospeter Grumeti (Pw2) and two other game scouts, Wambura George and Mugendi George while on the normal patrol at Kongoni area within Ikoma Wildlife Management Area, saw three persons in the area. They surrounded and arrested them. Upon research, they found them with 32 pieces of meat. They identified the meat as wildebeest meat.

They prepared a seizure certificate, which Maro Muhongo Makuru (**Pw1**), tendered as Exhibit P. E.1 and Wilbroad Vicent (**Pw3**), the wildlife warden identified the meat as that of wildebeest and prepared and tendered a trophy valuation certificate as exhibit P.E.3. Wilbroad Vicent (**Pw3**) found out that the trophy valued at Tshs. 5,980,000/= being the value of four wildebeest. The last prosecution witness was No. G.4209 DC Stephen, who tendered an inventory as exhibit P.E.3.

The appellants in their defence denied offence. They accepted to be arrested by the game scout. They denied to be found with the government trophy. They deposed that they were arrested within the grazing area.

The appeal was heard orally. The appellants adopted their grounds of appeal. They prayed to this Court to set them free.

The Respondent's State Attorney, Mr Temba strongly opposed the appeal. I will refer to his submission while answering the issues raised.

Did the trial court err to rely on the exhibits in the record to convict the appellants?

The appellants complained in the first, third and fourth grounds of appeal against the exhibits tendered. Their ground was that the exhibits were not tendered before the trial court. They also complained that the trophy were disposed in their absence.

Mr. Temba the learned state attorney, submitted that the exhibits were relevant to the charges. The inventory showed that the appellants participated when the magistrate ordered the exhibit to be disposed. On the second ground of appeal he stated that afforded the appellants a chance to call their witness to give their defence by the trial court.

The appellants were facing the offence of unlawful possession of government trophy, to prove the offence the prosecution was required to tender the trophy found in possession of the appellants. The prosecution was required to among other things that the meat the appellants were found in possession with was a government trophy. To establish that, the prosecution tendered an inventory form as Exh.P.E.3. The inventory form depicts that the magistrate ordered the police to dispose 32 pieces of meat. Wilbrod Vicent (**Pw3**) identified the 32 pieces of meat as wildebeest

meat and that four wildebeests were killed. The inventory was tendered instead of trophy (meat) because the magistrate remarked that the trophy was subject to speedy decay.

The law provides two different types of procedures of disposing exhibits which are subject to speedy decay in cases of this nature. **One** of the procedures of disposing of exhibits subject to speedy decay is under the Police General Orders (PGO). The procedure under the PGO is provided under paragraph 25 of PGO No. 229, which was discussed by the Court of Appeal in the case of **Mohamend Juma @ Mpakama v. R** Criminal Appeal No. 385/2017 (CAT Unreported). Paragraph 25 of the PGO states that-

25. 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 directed in **Mohamend Juma @ Mpakama v. R.**, before disposal of exhibits under the PGO is ordered, the accused person must be present and the court 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."

Another type of procedure of disposing of perishable exhibits is provided under section 101 (1) of the **Wildlife Conservation Act**, Cap 283 as amended by the **Written Laws Miscellaneous Act**, No.2 of

2017, which came into operation on the 21st February, 2021. It provides that-

101.-(1) The Court shall, on its own motion or upon application made by the prosecution in that behalf-

(a) Prior to commencement of the proceedings, order that-

*(i) any animal of trophy which is subject to speedy decay;
or*

(ii) any weapon, vehicle vessel or other article which is subject of destruction or depreciation,

and is intended to be used as evidence, be disposed of by the Director; or

(b) at any stage of the of proceedings, order that-

*(i) any animal of trophy which is subject to speedy decay;
or*

(ii) any weapon, vehicle vessel or other article which is subject of destruction or depreciation,

which has been tendered or put in evidence before it , be disposed of by the Director.

(2) The order of disposal under this section shall be sufficient proof of the matter in dispute before any court during trial.

(3)....(4)..... not applicable.

The inventory form, Exh. PE.3 was prepared under the Police General Orders. I examined the inventory form to find out whether the appellants appeared before the magistrate and whether the magistrate afforded them an opportunity to air their views. There is no evidence to suggest that the appellants appeared before the magistrates. It is therefore, obvious that the magistrate did not hear the appellants nor did

he hear them before he ordered the trophy to be disposed. For that reason, I find that the inventory, Exh. PE.3 was prepared in violation of the procedure provided under paragraph 25 of PGO No. 229. Its authenticity is questionable. It was wrong for the trial court to admit the inventory as exhibit. I expunge the inventory form, exhibit PE. 3, from the record because it was not properly prepared.

Having expunged exhibit P.E.3, I find that there was no evidence to prove the offence the appellants were charged and convicted with of unlawful possession of government trophy. I quash the appellants' conviction 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 Economic and Organized Crime Control Act, [Cap. 200, R.E. 2019]. Consequently, I set aside the sentence imposed against them.

I hesitate to order the appellants to be tried *de novo* as there is no evidence to prove the offence of unlawful possession of government trophy. I order their immediate release unless they are held in prisons for any other reasonable cause.

It is ordered accordingly.



J. R. Kahyoza

JUDGE

23/11/2021

Court: The Judgment to be delivered by the Deputy Registrar.



A handwritten signature in blue ink, appearing to read "J. R. Kahyoza".

J. R. Kahyoza

JUDGE

23/11/2021

Court: The Judgment delivered in the presence of the virtual presence of all appellants and Mr. Byamungu State Attorney for the respondent. B/C Ms . Neema, RMA.

E.G. RUJWAHUKA

DEPUTY REGISTRAR

24/11/2021