IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MUSOMA SUB REGISTRY

AT MUSOMA

CRIMINAL APPEAL NO 151 OF 2021

(Arising from Serengeti District Court at Mugumu Economic Case No 111 of 2020 by A.C. Mzalifu- RM)

KERARYO MWITA @ MUSENYE ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

31st May and 28th June, 2022

F. H. MAHIMBALI, J.:

The appellant Keraryo Mwita @ Musenye, was convicted by Serengeti District court in three counts of offences namely; Unlawful Entry into the National Park contrary to sections 21 (1) (a) (2) and section 29 (1) of the National Parks Act, Cap 282 R.E 2019 as amended by the written Laws (Miscellaneous Amendments) Act No. 11 of 2003 for first count, Unlawful Possession of weapons in the National Park contrary to section 24(1) (b) and (2) of the National Parks Act, Cap 282 R.E 2019 and Unlawful Possession of the Government Trophies contrary to section 86 (1) and (2) (iii) of the Wildlife Conservation Act,

Act No. 05 of 2009 as amended by Act No. 2 of 2016 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 2019 as amended by the Written Laws (Miscellaneous Amendments) Act No. 2 of 2016 of the Economic and Organised Crime Control Act, Cap 200 R.E 2019 for the third count.

It was alleged by the prosecution for the first count that on the 20th day of September, 2020 at Korongo la Hingira are within Serengeti District in Mara Region, the appellant entered into the said Serengeti National Park without permission of the Director thereof previously sought and obtained. As for the second count, it was alleged by the prosecution that having entered into the said National Park within Serengeti District in Mara Region, he was found being in unlawful possession weapons there in, to wit one panga and one spear and three trapping wires without permit and failed to satisfy an authorised officer that the same were intended to be used for purposes other than hunting, killing, wounding or capturing of wild animals. As for the third offense it was alleged by the prosecution that the appellant having entered into Serengeti National Park which is within Serengeti District in Mara Region, was found in unlawful possession of Government trophies

to wit: fore limbs of wildebeest attached with fresh ribs and fresh neck of wildebeest valued at Tshs. 1,495,000/= the property of the United Republic of Tanzania.

Upon the there being filed dully certificates conferring consent to prosecution and jurisdiction to the subordinate court, the appellant pleaded not guilty whereby the prosecution brought a total of four witnesses in proof of the two remaining offences fronted in the charge against the appellant. As it was in the trial court, the appellant as well at this Court fended for himself.

The summary of the case can be stated this way. That on the 20th September, 2020 the appellant was unlawfully found being within the Serengeti National Park at an area called Korongo la Hingira as he had no any permit from the authorised authority. In the course of search, he was found in unlawful possession of weapons to wit: one panga, spear and three trapping wires. He was further found in unlawful possession of government trophies. PW1 and PW2 testified to the effect that they arrested the appellant being within the National Park at an area called Korongo la Hingira unlawfully and that he had been in possession of the afore mentioned weapons unlawfully and the government trophies. The certificate of seizure in connection of the alleged trophies and weapons

was admitted as exhibit PE1 collectively and the said objects (weapons) were admitted as exhibit PE2. Whether the said alleged trophy was government trophy as per law, was the testimony of PW3 who testified that he is eight years experienced wildlife officer with Diploma in Wildlife Management from Mweka Wildlife College and that he identified the said carcass as belonging to Wildebeest animal, thus government trophy as is a wild animal. As it was a perishable good, they obtained an inventory order from magistrate which was tendered in court as exhibit PE4.

The appellant on the other hand disputed the claim of his arrest being within the National Park and being in possession of the alleged weapons and government trophy. He testified that on the 18th Sept 2020 about 03.00pm, he was arrested by park rangers while grazing his animals at the border. He clarified that he lives at the boarder of Serengeti National Park and on the material date, he was arrested while at the boarder grazing and forced to board into the vehicle of the National Park rangers.

Having heard the witnesses, the trial court convicted the appellant and sentenced him to serve one year imprisonment for the first and second counts and 20 years for the third count. The sentences were ordered to run concurrently.

Aggrieved by both conviction and sentence meted out against the appellant, he has preferred this appeal armed with a total of five grounds, which can be paraphrased as follows:

1. *That, the trial magistrate erred in law and facts to convict and sentence the appellant by admitting and considering wrong evidence by the prosecution in connection of the alleged government trophies.*
2. *That the trial magistrate erred in law in according weight the evidence of PW3 which was not reliable.*
3. *That the trial court did not accord the appellant with a chance of calling his witnesses for the defense of the accusations levelled against him.*
4. *That the trial court erred in law and fact in according weight the testimony of PW4 who was not reliable.*
5. *That the prosecution case was not proved beyond reasonable doubt.*

Based on these grounds of appeal, the appellant prays that his appeal be allowed and that he be acquitted.

On the other hand, the respondent being dully represented by Mr. Malekela learned state attorney, resisted the appeal save on the first count offence.

During the hearing of the appeal, the appellant had nothing useful to submit in support of his appeal but just prayed that his grounds of

appeal dully filed be adopted by the Court to form part of his submission.

In resisting the appeal, Mr. Malekela learned state attorney for the respondent just conceded with the appeal on the first count arguing that as per law, the offence of unlawful entry into the National Park is unknown to law. He submitted that, the charging and subsequent conviction was therefore improper as per law. As regards the second and third counts offences, he resisted the appeal arguing that the offences as per law were sufficiently established.

Arguing the first and fourth grounds of appeal jointly, Mr. Malekela submitted that the law is clear that when an inventory is being prepared, the accused person must be presented together with said perishable good before the nearest magistrate for an order of disposing the said perishable good. Making reference to the proceedings of 21st June 2020 at pages 28 and 29, the record is so clear. The admitted exhibit PE4 (inventory) is clear that the appellant when inquired before the magistrate during inventory proceedings, he is recorded to have recognised the said trophies and that he had no any permit authorising him to be in unlawful possession of the alleged trophies.

Countering ground number two of the appeal, Mr. Malekela was of the firm view that the testimony of PW3 he being wildlife officer is to the extent that he had been able to identify the said trophy as being of wild animal by name of Wildebeest and thus certified it as government trophy as per law by tendering the report thereof (exhibit PE3).

Responding to ground number three of the appeal, Mr. Malekela resisted the ground of appeal. The argument that the appellant was not accorded the opportunity of calling his witnesses is not justified by the court record. That as per page 32 of the trial court's typed proceedings, the record is clear that he would testify himself and under oath and he is recorded that he would not call any witness as he had none. He repeated so at page 34 of the typed proceedings when he submitted that he had no witness to call and closed his case. On this way, he rebutted the appellant's suggestion that he was denied the right to call his witnesses.

As regards the fifth ground of appeal, save for the first count in which he conceded to the appeal for non-existence of the charged offence, Mr. Malekela learned state attorney resisted the rest of the offences as being fully established as per law. Relying on the evidence by the prosecution in record, Mr. Malekela boasted that the Republic's

case was well proved beyond the reasonable doubt and urged this Court to dismiss the appeal on the second and third counts and maintain conviction and sentence meted out by the trial court.

Having heard the parties' submissions for and against the appeal, the vital question for consideration is whether the appeal is merited. In digest to the all grounds of appeal, since they all boil into issues of facts only, the consideration of the appeal will be whether there has been prove of the case beyond reasonable doubt as per law.

As regards the first charged offence as per law, I agree with Mr. Malekela that there is no known offence of unlawful entry into the National Parks so far known by law. The same reads, and I hereby quote it as follows:

> *21.-(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;*
>
> *(2) Any person who contravenes the provisions of this section commits an offence against this Act.*

29.-(1) Any person who commits an offence against this Act is on conviction, if no other penalty is specified herein, liable to a fine not exceeding ten thousand shillings or to imprisonment for a term not 18 exceeding one year or to both.

Therefore, the charging and conviction thereof was unlawful and thus unjustified. Conviction and sentence meted out thereof is thereof quashed and set aside.

The second and third counts, will be considered on the context whether the charges were established beyond reasonable doubt. In essence, I will dwell much on the fifth ground of appeal which I think is capable of disposing of this appeal. I say so because, for the second offence to stand, there ought to have been evidence to the effect that at the point of the said arrest which is at Korongo la Hingira area was actually within the coordinates of Serengeti National Park. In assessing the testimony of PW1 and PW2 who are arresting officers, none testified about the coordinates of the said Korongo la Hingira was actually within the coordinates of Serengeti National Park. Serengeti National Park being found statutorily established, ought to be clearly stated its geographical boundaries so as to establish whether at the said Korongo la Hingira area also falls within those established coordinates.

With this, the second offence appears not being established by the prosecution evidence.

As regards the third count, the issue for consideration is whether the said offence of being unlawful possession has been dully established by evidence. It was expected that there be clear and concrete evidence by the prosecution that what was alleged to be trophy is really government trophy as per law. The law responsible with the management of wildlife affairs, recognizes the following shall be Government trophies and shall remain to be the property of the government - (a) any animal which has been killed or captured without a license, permit, written permission or written authority granted under this Act, and any part of any such animal; (b) any animal which is found dead, and any part of any such animal; (c) any animal which has been killed in defence of life or property and any part of any such animal; (d) any trophy which is in the possession of any person who is unable to satisfy the Director that he lawfully acquired the same; (e) any trophy in respect of which a breach of the provisions of this Act has been committed; (f) any trophy which the Minister may, by order in the Gazette, declare to be Government trophy; (g) specimens originating from Tanzania exported or re-exported in contravention of the

provisions of this Act and CITES implementation regulations; and (h) specimens re-exported or imported in contravention of the provisions of CITES which cannot be returned to the country of origin (see section 85 of the Wildlife Conservation Act).

In fact, I am aware that the law imposes the obligation to wildlife officers to state whether the said animal is wildebeest and state its value and the same shall be prima facie evidence of the matters stated therein (see section 86 (4) of the wildlife Conservation Act). However, he being a wildlife expert is required as a matter of law to state the scientific features of a particular wild animal for it to be established that it is really a description feature of a particular wild animal. In this particular case, we see the testimony of PW3 – Mr. Wilbroad Vincent (Wildlife officer), in his testimony at page 25 of the typed proceedings described the said PE4 exhibit to be wildebeest animal because of the following descriptive features, I quote:

> *"..There were fore limbs attached with fresh ribs and neck all of wildebeest. I did identify the exhibits to be government trophies because it had a skin which had a general colour slighter grey to dark brown and they had hairs to cherry red...."*

The issue for consideration is whether this description is sufficient to be scientific features of wildebeest animal. Can those features not be borne by other domestic animals? According to law, an expert witness is expected to furnish the court with necessary scientific criteria for testing the accuracy of their conclusions so as to enable the court to form its own independent judgment by application of these criteria to the facts proven in evidence (see **Rep V. Kerstin Cameron** [2003] T.L.R 85).

My conclusion on evidential probity of exhibit PE4 in this case ultimately coincides with that of the appellant. Exhibits PE4 cannot be relied on to prove that the appellant was found in unlawful possession of Government trophies mentioned in the charge sheet. In the absence of clear scientific criteria linking the features thereof and its clear conclusions so as to enable the court to form its own independent judgment by application of these criteria to the facts proven in evidence, it can hardly be believed that the said descriptive features belong to none but wildebeest as suggested.

All said and done, this court holds that since all the three counts were not proved beyond reasonable doubt, this appeal is allowed and the trial court's conviction on all charged offences is quashed, and the sentences meted out are set aside.

This court orders the immediate release of the appellant from custody unless he is lawfully held.

It is so ordered.

DATED at MUSOMA this 28th day of June, 2022.

F.H. Mahimbali

Judge

Court: Judgment read via phone conference today 28th day of June, 2022 at 14:20 hours before me, E. R. Marley Ag – Deputy Registrar.

E. R. Marley - SRM

Ag, Deputy Registrar

28/06/2022