IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF MUSOMA

AT MUSOMA

CRIMINAL APPEAL CASE No. 146 OF 2021

(Arising from the District Court of Serengeti at Mugumu in Economic Case No. 58 of 2020)

MAKURU JOSEPH @ MOBE

MASANJA MASANJA @ KING'ARI ..... **APPELLANTS**

Versus

REPUBLIC ..... **RESPONDENT**

JUDGMENT

14.03.2022 & 06.04.2022
F.H. Mtulya, J.:

The **District Court of Serengeti at Mugumu** (the district court) on 29th day of June 2021 delivered a decision in **Economic Case No. 58 of 2020** (the case) 2021 and convicted Mr. Makuru Joseph @ Mobe and Mr. Masanja Masanja @ King'ari (the appellants) for three offences, *viz*: first, unlawfully entry in the game reserve contrary to section 15 (1) & 2 of the **Wildlife Conservation Act** [Cap. 283 R.E. 2002] as amended by the Written Laws (Miscellaneous Amendment) Act No. 2 of 2016 (the Wildlife Act); unlawful possession of weapon in the game reserve against section 17 (1) & (2) of the Wildlife Act read together with section 57 (1) & 60 (2) and paragraph 14 of the First Schedule to the **Economic and Organized Crimes Control Act** [Cap. 200 R.E. 2019] (the Economic Crimes Act); and unlawful possession

of government trophy against section 86 (1) & 2 (b) of the **Wildlife Act** read together with section 57 (1) & 60 (2) and paragraph 14 of the First Schedule to the **Economic Crimes Act**. After the conviction, the appellants were sentenced to serve two (2) years imprisonment for the first offence, two (2) years imprisonment for the second offence and twenty (20) years imprisonment for the third offence and all sentences were ordered to run concurrently.

The appellants were not happy with both the conviction and sentence and had preferred the present appeal disputing the judgment of the district court in the case. In this court, the appellants filed a total of five (5) reasons. The reasons in brief show the following complaints: first, the district court admitted wrong exhibit *panga* instead of knife; second, district court admitted wrong evidence of two carcasses of zebra instead of two fresh carcasses of zebra; third, the evidence of Wilbrod Vicent (PW3) was fabricated; fourth, absence of the appellants during destruction of the government trophies; and finally, no photography was produced in court as per requirement of the law.

During the hearing of the appeal on 14th March 2022 via teleconference, the appellants briefly submitted that the evidences produced by prosecution witness Paineto Mafwele (PW1) and Kabichi Suma (PW2) were fabricated as contradicted with the allegation in the charge sheet. In explaining their point, the appellants submitted that

they were charged with unlawful possession of weapons, spear and knife intended to be used for hunting, killing and capturing animals, and PW1 and PW2 testified on spear and knife, but PW1 tendered before the district court a *panga*. Secondly, the appellant contended that they were prosecuted for unlawful possession of government trophy two fresh carcasses whereas the evidence of PW1 and PW2 display two carcasses of zebra. On the third complaint, the appellant submitted that the testimony of PW3 was fabricated as he was silent in his testimony as to where he had identified the zebra carcasses.

With regard to the fourth ground, the appellant submitted that the claimed trophies were destroyed in their absence and were not consulted or signed any documents to such effect. In their opinions, prosecution witness number four, a police officer G.3694 D/Cpl. Shaban (PW4) was invited in the case to state on paper work, and not reality on ground hence his evidence was fabricated. Finally, the appellants submitted that the destruction of the trophies was not supported by photograph as per requirement of the law.

Replying the submissions of the appellants Mr. Isiahaka Ibrahim, learned State Attorney, who appeared for the Republic, conceded all grounds of appeal save for the first ground which is related to first and second offences. The reasoning of Mr. Ibrahim was straight forward that the appellants are complaining on Inventory Form which was admitted and relied by the district court in convicting and

sentencing the appellants for the third offence, while the laws regulating the recording of the Inventory Form was not followed. In order to bolster his argument, Mr. Ibrahim cited the law set in the precedent of **Mohamed Juma Mpakama v. Republic**, Criminal Appeal No. 385 of 2017, which require presence of learned magistrate, questioning and recording comments of the accused persons during destruction of the trophies.

According to Mr. Ibrahim, the Inventory Form which was tendered by PW4 was not attached with comments or any other document to show that the appellants were found with the trophies or present during the destruction of the same. To Mr. Ibrahim's opinion, even if the Inventory Form was recorded according to the law, the evidence of PW3 as displayed at page 30 of the proceedings in the district court, did not identify special features of the animal to distinguish it from other animals.

On the other hand, Mr. Ibrahim contended that the Republic had established beyond doubt on the first and second offences hence protested the first ground of appeal. According to him, in the first offence, the particulars of offence show that the appellant were found at the game reserve without permit and in the second offence, they are displayed to be in possession of knife and spear intending for hunting, killing and capturing animals in the game reserve. In his opinion, the complaint on distinction between *panga* and knife as

reflected on the record is minor discrepancy that did not prejudice the appellants as does not go to the root of the matter. According to him, the admission of evidences in Certificate of Seizure, knife and *panga* were not protested by the appellants. In a brief rejoinder, the appellants submitted that there is huge distinction between weapons *panga* and knife and the matter goes to the root of the offence. In their opinion, under normal circumstances, a grandfather cannot be compared to grandson and similarly a *panga* cannot be compared with a knife. Finally, the appellants stated that the case against them was fabricated by the prosecution without credible and reliable evidences.

I have perused the record of this appeal and cited precedent in **Mohamed Juma Mpakama v. Republic** (supra). The record shows that the appellants were arrested at Mto Rubana area into Ikorongo/ Grumeti Game Reserve within Serengeti District of Mara Region on 12th day of July 2020 in possession of a knife, spear and government trophy, two fresh carcasses of zebra valued at Tanzanian Shillings 5, 520,000 and subsequently arraigned before the district court for three offences of unlawful entry into the game reserve, unlawful possession of weapon in the game reserve and unlawful possession of government trophies.

In order to establish the named offences against the appellants, the Republic had brought in the case a total of four (4) witnesses and

tendered five (5) exhibits. In order to justify the third offence, unlawful possession of the government trophies, the Republic summoned PW1 to tender Certificate of Seizure (PE.1) and one panga & one spear (PE. 2); PW3 to tender Trophy Valuation Certificate (PE. 4), and PW4 to tender the Inventory Form (PE. 5). During the hearing of the case and tendering of the evidences, the appellants did not protest admission of the documents. However, the evidence in PE.5 as from the record, is silent questioning and recording of comments from the appellants. Similarly, the Republic remained silent on the requirement of the law in **paragraph 25 of the Police General Orders No. 229 (Investigation-Exhibits)** on the right to be heard and photographing of the perishable Government trophies. This fault is what is generally complained by the appellants in their second to the fifth ground of appeal.

It is fortunate that the cited law in paragraph 25 of the Police General Orders No. 229, has already received precedent of our superior court, the Court of Appeal and Mr. Ibrahim, as an officer of this court, has assisted this court in citing it, namely, **Mohamed Juma Mpakama v. Republic** (supra). This court being inferior to the Court of Appeal, it has no options rather than to follow the course. However, for purposes of clarity and appreciation of the directives of our superior court, I will quote the most cited text in page 23 of the precedent:

...paragraph 25 [paragraph 25 of PGO No. 229 (Investigation-Exhibits)] envisages any nearest magistrate, who may issue an order to dispose of perishable exhibit. This paragraph 25 in addition emphasizes the mandatory right of an accused person (if he is in custody or out on police bail) to be present before the magistrate and be heard. In the instant appeal, the appellant was not taken before the primary court magistrate and be heard before the magistrate issued the disposal order (exhibit PE.3). While the police investigator, was fully entitled to seek the disposal order from the primary court magistrate, the resulting Inventory Form (exhibit PE.3) cannot be proved against the appellant because he was not given the opportunity to be heard by the primary court magistrate. In addition, no photographs of the perishable Government trophies were taken as directed by the PGO....Exhibit PE.3 cannot be relied on to prove that the appellant was found in unlawful possession of the Government trophies mentioned in the charge sheet.

From the above quoted statement, it is obvious that exhibit PE.5 tendered by PW4 in the present appeal cannot be relied on to prove

that the appellants were found in unlawful possession of the Government trophies mention in the charge sheet.

The record of this appeal shows discrepancies on what exactly the appellants were found with. During evidence recording of PW1 and PW2, as reflected at page 22 and 27 respectively, in the proceedings of the district court in the case, the witnesses registered statement on one knife, but the Republic tendered one *panga*. In this court, the parties are at horns as whether that is minor or major discrepancy. The law regulating discrepancies is well enunciated by the Court of Appeal in the precedent of **Dickson Elia Nsamba Shapwata & Another v. Republic**, Criminal Appeal No. 92 of 2007 where it was stated that minor discrepancies and contradictions cannot fault prosecution case. The reasoning of such statement stems from the fact that minor contradictions and discrepancies cannot be avoided in cases.

In present appeal, ordinary persons of Serengeti District in Mara Region are complaining on the contradictions and discrepancies of the weapons of *panga* and knife. The appellants in this appeal had produced the example of grandfather and grandson to compare *panga* as a huge weapon as grandfather and knife as a minor weapon as grandchild hence cannot be said as one and the same thing. On the other hand, during the hearing of the case at this stage, Mr. Ibrahim contended that *panga* and knife are all sharp objects and it is difficult

to distinguish them. On my part, I think, each case may be considered on its own peculiar merit. In the present appeal, PW1 and PW2 were adult educated persons with knowledge on wildlife and hunting weapons. They cannot be said to have failed to distinguish *panga* and knife. I think the issue of major and minor discrepancies may be considered in conjunction with level of education of a witness, experience on the weapons used in hunting, and time span of the claimed commission of a offence & production of evidences in courts.

In the present appeal, record shows that PW1 is a game ranger with twelve (12) years' experience in wildlife matters whereas PW2 is a ranger of nine years' experience in wildlife issues. Their evidences in testifying knife and tendering *panga* with such huge experience in wildlife and weapons used in capturing animals invite questions. It those questions which in criminal law we call doubts and practice requires courts to resolve the doubts in favour of accused persons (see: **Mohamed Said Matula v. Republic** [1995] TLR 3). The evidences produced by PW1 and PW2 cannot be relied to convict the appellants. In my considered opinion, that is a major discrepancy moving into the root of the matter that the dual appellants were found in possession of the weapon knife and spear. In February last year, the Court of Appeal was called in the precedent of **Mohamed Juma Mpakama v. Republic** (supra) to determine: *whether a discrepancy in evidence produced in court and charge sheet on a spear and an arrow*

was minor. The reply from our superior court is reflected at page 24 of the decision:

> *We have carefully read the particular of the third count of being found in unlawful possession of one arrow and one spear. The learned counsel is correct to point out on the divergence between the particulars of offence and the evidence of PW1 and PW2on the type of weapons they found in the possession of the appellant...we think the discrepancy between the type of weapons mentioned in the particulars of the charge, and the weapons mentioned by the prosecution witnesses is not minor. It goes to the root of the third count.*

In the present appeal, I think the discrepancy between the weapon knife mentioned in the particulars of offence mentioned in the second count in the charge sheet, and the weapon *panga* tendered in the district court by PW1 is not minor. It goes to the root of the second count. Following the directives of the Court of Appeal on issues of similar species and discrepancies brought by prosecution side in criminal cases, this court's hand are tied. For the sake of certainty and predictability of decisions from our courts, I am not intending to produce any interpolations on the subject. The second offence against the appellant was not established as per standards

required in proving criminal cases (see: section 3 (2)(a) of the Evidence Act [Cap. 6 R.E. 2019] and precedents in **Said Hemed v. Republic** [1987] TLR 117; **Mohamed Matula v. Republic** [1995] TLR 3; and **Horombo Elikaria v. Republic**, Criminal Appeal No. 50 of 2005).

The record of present appeal shows that the appellant did not dispute evidences of PW1 and PW2 of their presence in the game reserve. Reading page 40 and 42 of the proceedings of the district court in the case, the appellants had produced general statement in the commission of the first offence, unlawful entry into the game reserve. In their evidence at the district court, the first appellant stated that on 12th July 2020, he was at Tingirima Centre carrying fish and was arrested by park rangers who were on patrol and was taken to Sasakwa Camp. According to the first appellant, after a day stay at Sasakwa Camp, they were ferried to Mugumu Police Station. On his part the second appellant alleged that on the same day, he was arrested along the road towards Tingirima Center by the game rangers for reasons of possessing fish. According to the second appellant, on the next day, he was ferried to Mugumu Police Station along with the first appellant.

The evidences registered by the appellants were protesting specific pieces of evidence registered by PW1 and PW2, but produced general evidence of their presence at the scene of the crime.

According to PW1, as displayed at page 21 & 22 of the proceedings, on 12th July 2020 at around 16:00 hours at Mto Robani area into Ikorongo Game Reserve within Serengeti District, when in game patrol, saw and arrested the appellants who had luggage containing one spear, one knife and two carcasses of zebra. PW1 alleged that he followed all necessary steps in seizing and recording of the matter assisted with Mr. Kabichi Suma, John Robert and Adam Limi and finally registered the appellants at Mugumu Police Station in number MUG/IR/1828/2020. Mr. Kabichi Suma (PW2) was summoned in the district court to corroborate the statement of PW1 and briefly stated that on 12th July 2022 at about 16:30 hours, while on game patrol, at Mto Robana area into Ikorongo Game Reserve, they found and arrested the appellants in possession of one spear, one knife and two carcasses of zebra. After the arrest, according to PW2, they arraigned the dual to the Mugumu Police Station and registered police case number MUG/IR/1828/2020. The evidence on involvement of the investigation machinery of this State was brought in the case by a police officer (PW4).

Scanning the record and materials produced by both sides, it is without doubts that the evidence on PW1 & PW2 are credible and reliable from their consistencies of evidences produced in the district court. I am aware that when the prosecution produce credible and reliable witnesses which establish particular offence, courts will not

hesitate to convict accused persons alleged to have committed the particular crime (see: **Marwa Wangiti v. Republic** [2002] TLR 39). In the present appeal the fingers of PW1 and PW2 towards the dual appellants on their presence in the game reserve on 12th July 2020 against section 15 (1) & 2 of the Wildlife Act is vivid. In any case, the dual appellants remained silent on important materials which were registered by PW1 and PW2. The law regulating silence in asking important matters during hearing of cases requires courts to draw adverse inference as against appellants who fail to perform such important duty (see: **Jona Mosi @ Masoya v. Republic**, Crimial Case Appeal No. 144 of 2021; **Martin Misara v. Republic**, Criminal Appeal No. 428 of 2016; **Joseph Mkumbwa & Another v. Republic**, Criminal Appeal No. 64 of 2007; and **Azizi Abdallah v. Republic** [1991] TLR 71].

Having said so, it is obvious that the second and third offences were not proved beyond reasonable doubt by the prosecution hence the district court in the case arrived at wrong decision in convicting and sentencing the appellants. In that case, I have decided to quash the convictions and sentences imposed against the appellants with regard to the second and third counts in the charge sheet. On the other hand, I sustain the conviction and sentence with regard to the first count meted to the appellants in the case at the district court. However, the sentence of two (2) years imprisonment is ordered to

run from the date when the judgment of the district court in the case was delivered, that is 29th June 2021.

It is so ordered.

Right of appeal explained.

F.H. Mtulya

Judge

06.04.2022

This judgment was delivered in chambers under the seal of this court in the presence of the learned State Attorney, Mr. Yesse Temba and in the presence of the appellants, Mr. Makuru Joseph @ Mobe and Mr. Masanja Masanja @ King'ari through teleconference placed at Serengeti Prison Mara Region and in the offices of the Director of Public Prosecutions, Musoma in Mara Region.

THE HIGH COURT OF TANZANIA MUSOMA

T.J. Marwa

Ag. Deputy Registrar

06.04.2022