IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF MUSOMA

AT MUSOMA

CRIMINAL APPEAL CASE No. 144 OF 2021

(Arising from the District Court of Serengeti at Mugumu in Economic Case No. 55 of 2020)

JONA MOSI @ MASOYA ..... **APPELLANT**

Versus

REPUBLIC ..... **RESPONDENT**

JUDGMENT

14.03.2022 & 04.04.2022
F.H. Mtulya, J.:

The appellant, Mr. Jona Mosi @ Masoya was convicted by the **District Court of Serengeti at Mugumu** (the district court) in **Criminal Case No. 55 of 2020** (the case) on 29th day of July 2021 for three offences, namely: first, unlawfully entry in the national park contrary to section 21 (1) (a) & 2 and 29 of the **National Parks Act** [Cap. 282 R.E. 2002] as amended by the Written Laws (Miscellaneous Amendment) Act No. 11 of 2003 (the Act); unlawful possession of weapon in the national park against section 24 (1) (b) & (2) of the Act; and unlawful possession of government trophy against section 86 (1) & 2 (c) of the **Wildlife Conservation Act** [Cap. 283 R.E. 2002] as amended by the Written Laws (Miscellaneous Amendment) Act No. 2 of 2016 read together with section 57 (1) & 60 (2) and paragraph 14 of the Schedule to the **Economic and Organized Crimes Control Act**

[Cap. 200 R.E. 2019] (the economic crimes law). After the conviction, the district court had sentenced the appellant 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 by the district court to run concurrently.

The appellant was aggrieved by 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 appellant filed a total of seven (7) reasons in disputing the judgment, which in brief show the following complaints: absence of an independent witness during the arrest; he was not present during destruction of the claimed government trophies; absence of evidence to prove the prosecution case; failure of the prosecution to abide with searching procedures; evidences brought by PW2 and PW4 were hearsay evidences; material witness Mr. Drique Shaban who was mentioned by PW1 was not summoned by the prosecution side; and finally, the district court relied on hearsay evidence of PW4 to convict the appellant.

The appeal was scheduled for complaints hearing on 14th March 2022 and the appellant, a layperson, argued the appeal himself without any legal representation and briefly stated that: he was arrested at Mara River in presence of many people, including Mr.

Juma Masamaki and Kibodo Nyarobi, who were grazing animals, but the prosecution declined to call any of them or any other independent witness to testify in the district court; the government trophies were destroyed in his absence; the evidence of destruction were not brought in the district court and is not known whether it was carcasses or fresh meat; he did not sign any paper to justify his presence during the destruction of the trophies; the district court heavily relied on evidences of PW2 and PW4 who are not reliable witnesses and failed to consider defence evidences. The appellant submitted further that all evidences brought by the prosecution side in the district court were fabricated intended to cause miscarriage of justice on the appellant's side.

In reply of the submission, the Republic invited Mr. Isiahaka Ibrahim, learned State Attorney to argue the appeal. In his brief submission, Mr. Ibrahim submitted that the first count in which the appellant was prosecuted is related to unlawful entry into national park contrary to section 21 (1) (a) & 2 of the Act which is not an offence under the Act hence the conviction and sentence meted to the appellant is a nullity.

With regard to the third ground, Mr. Ibrahim conceded that the appellant was not given the right to be heard as per precedent in **Mohamed Juma Mpakama v. Republic**, Criminal Appeal No. 385 of 2017, as he was not invited and asked questions related to the

trophies during the destruction of the trophies. According to Mr. Ibrahim, the Inventory Form (PE.4), which was produced during the hearing of the case by police officer H.5098 D/Cpl. Daniel (PW4), may be expunged from the record as it did not abide with the law. In his opinion, once the evidence in exhibit PE.4 is expunged, it is obvious that the third offence dies a natural death as it stems from the exhibit PE. 4.

However, Mr. Ibrahim contended that the prosecution had proved its case beyond reasonable doubt as to the second count. In order to substantiate his claim, Mr. Ibrahim stated that: the evidence of Samson Njoomi (PW1) and exhibits certificate of seizure (PE.1) and weapons of one knife & four animal trapping wires (PE. 2) show that the appellant committed the charged offence. According to Mr. Ibrahim, the exhibits were admitted in the case without any protest from the appellant and the appellant during cross examination did not ask any questions on PE.1 and PE.2. To Mr. Ibrahim's opinion, the appellant had accepted the consequences of the evidence tendered and cannot afterward claim the case was fabricated against him.

In his submission, Mr. Ibrahim contended further that PW1 mentioned a fellow park ranger called Mr. Drique Shaban, who was present during the search exercise, but the Republic declined to summon him because that is not requirement of the law in section 143 of the **Evidence Act** [Cap. 6 R.E. 20219]. According to Mr.

Ibrahim, the law is silent on specific number of witness and to his opinion, what is important is credibility and reliability of the witnesses. To his view, witness PW1 is credible and reliable witness as he took an oath and adduced consistent evidence in the case. Mr. Ibrahim also submitted that the appellant was not prejudiced in absence of the evidence of Mr. Drique Shaban.

With the evidences brought in the case by Wilbrod Vicent (PW2) and police officer H.5098 D/Cpl. Daniel (PW4), Mr. Ibrahim submitted that PW2 was called to state the value of government trophies and tendered a Trophy Valuation Certificate (PE.3) and did not mention the appellant whereas PW4 investigated the case and tendered Inventory Form (PE.4). According to him, the two witnesses cannot be said to have produced hearsay evidence.

On complaint related to presence of an independent witness, Mr. Ibrahim replied that the offence was committed in national park where people do not live hence it was difficult to have an independent witness. In any case, according to Mr. Ibrahim, the law does not set it compulsory to have an independent witness and that the appellant had introduce the issue as an afterthought at the appeal stage. Finally, Mr. Ibrahim contended that the appellant's evidence was considered by the district court and found to have no any merit as depicted at page 6 and 7 of the decision of the district court. When the appellant was called to rejoin the submission registered by Mr.

Ibrahim, he declined stating that all that he has stated during submission in chief display the reality of the matter.

I have scanned the record of the present appeal and submissions registered by the parties. In my opinion, and for purpose of clarity, I will quote relevant materials, in brief, which were registered by parties, especially evidence of PW1 and the appellant. The reason is obvious, that it is the evidence and exhibits tendered by PW1 which point a finger at the appellant on the commission of the offences and it is the appellant who disputed them. The proceedings of the district court in the case, as recorded at page 25 of the typed proceedings, show that PW1 was summoned and testified that:

> *...on 12th July 2020 at about 16:00hours at Mlima Kilawila area within Serengeti National Park in Serengeti District in Mara Region, I and my fellows Wilson Adam and Drique Shaban were at patrol and saw footsteps, followed them and managed to arrest one person into the bush after surrounding there. He was possessing one knife, four animal trapping wires and four pieces of dried meat of wildebeest. He told us that he did not have any permit to enter into the park, possess the said weapons and trophies. He introduced to us by the name of Jona Mosi @ Masoya...we filled a certificate of seizure, signed with all of us including the accused person...the knife was pink in*

colour, tied with black rubber...then we took him with exhibits to Mugumu Police Station...the case was filed MUG/IR/1826/2020.

In order to substantiate his allegations against the appellant, PW1 had tendered in the district court exhibits PE.1 and PE.2. The Republic on his part, in order to corroborate the statement of PW1, had marshalled all witnesses, who from their connection with the transaction in question, were able to testify on material facts. The witnesses were within the reach, summoned and testified. In the present case, PW2 was involved in valuating the trophies and tendered exhibit PE.3 in the case. PW4 was called to testify on registration of the case number MUG/IR/1826/202 at Mugumu Police and registered PE.4 to substantiate his testimony. Mr. Wilson Adam, who was cited by PW1 in his evidence, was marshalled as prosecution material witness number three (PW3) to corroborate the evidence of PW1 at the scene of the crime.

In defence, the appellant protested the materials which were brought in the district court by the prosecution side contending that he was arrested while cutting trees out of the bush of the park. In his testimony recorded at page 46 of the typed proceedings of the district court, the appellant stated that:

...on 15th June 2020 at about 09:00hours, I took panga, axe and bicycle for cutting trees... [I] went at Mto

Masala. I stated to cut trees...some people came, asked me why I cut those trees. I answered, I cut them because I want woods for charcoal. They asked me if I have a permit to do so. I told them, nyie ni nani mniulize hivyo? Walijibu ni maliasili. They directed me to enter into car with my things...then they brought me to Mugumu Police Station. On 14th July 2020 they decided to bring me to this court...I did not go there [in the park].

When the appellant was questioned whether he is living with his wife or may invite any other person to corroborate his testimony, the appellant stated that he is living with his wife but did not inform her of his voyage to tree cutting and had no any other witnesses to call in support of his statements.

The appellant also remained silent on materials and evidences which were registered by the prosecution, specifically PE.1 and PE.2. The law regulating silence in asking or disputing important matters or calling material witnesses during hearing of the case requires this court to draw an adverse inference as against appellants who fail to perform such duties (see: **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]. The record in the present appeal shows that the appellant had

produced statement without support of evidences or call any witness to testify in support of his allegation.

I am aware that during the hearing of the present appeal in his court, the appellant submitted that he was arrested in presence of other persons who were grazing animals, namely: Mr. Juma Masamaki and Mr. Kibodo Nyarobi. However, I perused the proceedings of the district court in the case from 14th July 202 when the appellant was brought in the district court to 13th July 2021 when the defence case was closed, I did not see any facts related to the two named persons. In general, the appellant was silent in mentioning the dual cited persons during the proceedings in the district court. The allegation of the appellant on the two named persons may be termed as registration of an afterthought at this stage, which was clearly noted by Mr. Ibrahim.

It is a settled law in this jurisdiction that court record is always presumed to accurately represent what actually transpired in court (see: **Alex Ndendya v. Republic**, Criminal Appeal No. 207 of 2018; **Shabir F. A. Jess v. Rajkumar Deogra**, Civil Reference No. 12 of 1994; **Flano Alphonce Masalu @ Singu & Four Others v. Republic**, Criminal Appeal No. 366 of 2018 and **Paulo Osinya v. R** [1959] E.A 353. The court record, in short, is a serious document and cannot be lightly disregarded and appellants cannot invite other interpolations which are not reflected on the proceedings (see: **Halfani Sudi v.**

Abieza Chichili (supra) and **The Director of Public Prosecution v. Labda Jumaa Bakari** (supra).

I am equally aware and agree with the submission of Mr. Ibrahim that no particular number of witnesses is required for proof of any fact in criminal cases brought before our courts as per section 143 of the Evidence Act. The submission has already received support in the precedents of **Selemani Makumba v. Republic** [2006] TLR 376 and **Yohana Msigwa v. Republic** [1990] TLR 148. What is important is the weight of materials tendered in courts to substantiate cases. In the present case, I must admit, the evidence produced by PW1 and exhibits PE. 1 and PE.2, established beyond doubt that the appellant committed the offence of unlawful possession of weapons in national park. Similarly, there is consistency of evidence produced by PW1 and corroboration brought in the case by PW3 and PW4. In presence of evidence of PW1 and materials witness PW3, there is no need to complain absence of Mr. Drique Shaban. The prosecution had in possession of enough credible & reliable witnesses and exhibits which established the second offence beyond reasonable doubt as per requirement of the law in the precedent of **Marwa Wangiti v. Republic** [2002] TLR 39

I understand there are complaint on hearsay evidence on part of PW2 and PW4. However, the record in this appeal shows that the dual were invited as expert witnesses in investigation of criminal

matters and valuation of trophies and have tendered exhibits related to their profession. PW2 was called as an expert with eight years' experience in trophies' values to state on the value of claimed trophies. On the other hand PW4 was summoned to state on filling of the case number MUG/IR/1826/202 at Mugumu Police and tendered PE.4.

In any case, Mr. Ibrahim submitted and prayed to this court to expunge exhibit PE.4 from the record for want of proper record of the court and adherence of the precedent **Mohamed Juma Mpakama v. Republic** (supra) on the right to participate in destruction of the trophies. I have perused the cited precedent and found at page 23 the directives of the Court of Appeal on the subject, and need not to be detained. It is now the settled law that failure to participate accused persons in process of destructing trophies amounts to denial to the right to fair hearing. For purposes of appreciation of the precedent, I briefly quote the text recorded at page 23 of the decision:

> *...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.

On the same course, there is a Court of Appeal precedent on the current position of the offence of unlawful entry into national parks contrary to section 21 (1) (a) & (2) of the Act. The Court of Appeal was invited on 25th December last year to determine an appeal brought before it in the precedent of **Willy Kitinyi @ Marwa v. Republic**, Criminal Appeal No. 511 of 2019, and observed that:

We instantly agree with Mr. Temba that in relation to the first count, the appellant was charged with and convicted on a non-existing offence, because section 21 (1) (a) (2)

of the NPA does not create the offence of unlawful entry into a game reserve. We need not mince words, in our view, because this is not one of those defects that can be cured by section 388 of the CPA. Very recently in ***Dogo Marwa @ Sigana v. Republic****, Criminal Appeal No. 512 of 2019, we faced a similar situation and held that: it is now apparent that the amendment brought under Act No. 11 of 2003 deleted the actus reus (illegal entry or illegal remaining in a national park) and got confusion in section 21 (1) of the NPA.*

Following this statement of our superior court, it is obvious that this court cannot produce any other interpolations. The failure to call and participate the appellant in the process of destruction of the trophies denied the appellant a fair hearing on the first offence because he could not prepare an informed defence against a non-existing offence.

I am also equally aware that the appellant claimed that the district court heavily relied on the evidence of PW1 without considering the need of an independent witness during his arrest or taking due regard of his defence. The complaint on the need of independent witness was well answered by Mr. Ibrahim who contended that the second offence was committed in national park where people do not live hence it was difficult to have an

independent witness. In his opinion, the law does not set it compulsory to have an independent witness.

I entirely agree with Mr. Ibrahim and there is large family on the subject (see: **Alex Rwebugiza v. The Republic**, Criminal Appeal No. 85 of 2020; **Jibril Okash Hemed v. Republic**, Criminal Appeal No. 331 of 2017; **Tongora Wambura v. Director of Public Prosecution**, Criminal Appeal No. 212 of 2006; **Saidi Thabit & Another v. Republic**, Criminal Appeal No. 26 0f 2020; **Republic v. Mussa Hatibu Sembe**, Economic Case No. 4 of 2019; **David Athanas @ Makasi Joseph Masima @ Shando v. Republic**, Criminal Appeal No. 168 of 2017; **Kassim Abdallah v. Republic**, Criminal Appeal No. 52 of 2020). I need not be retain on the subject which has directives of this court and Court of Appeal, especially when the criminal investigation machinery was consulted and participated (see: **Alex Rwebugiza v. The Republic** (supra).

With the complaint on consideration of defence case, Mr. Ibrahim cited page 6 and 7 of the decision of the district court. In the cited pages, the following is displayed, in brief:

> *In his side, DW1's contention that he was caught at Mto Masala area cutting down some trees. Subsequently, the rangers came at him and arrested him. At the time he went to cut the said trees, he did not tell his wife as well as to call her to testify... the evidence adduced by both*

parties and exhibit PE.1 as was tendered by by PW1 and admitted without objection. I find that the testimonies of PW1 and PW3 satisfactorily proved beyond reasonable doubt that they found the accused person at Mlima Kilawila into the Serengeti National Park without lawful permit...they arrested and searched him and found him in possession of one knife and four animal trapping wires...without sufficient explanations...

From the cited text, it is vivid that the district court had considered both the prosecution and defence evidences and came to the right conclusion in convicting the appellant with the second offence and properly sentenced him to two (2) years imprisonment. In that case, I do not need to interfere with the decision of the district court with regard to the second count hence sustain the conviction and sentence meted to the appellant in the district court. However, the sentence is ordered to run from the date when the judgment of the district court in the case was entered, that is 29th July 2021.

It is so ordered.

Right of appeal explained.

F.H. Mtulya

Judge

04.04.2022

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 appellant, Mr. Jona Mosi @Masoya through teleconference placed at Serengeti Prison in Mara Region and in the offices of the Director of Public Prosecutions, Musoma in Mara Region.

T. J. Marwa
Ag. Deputy Registrar
04.04.2022