IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB-REGISTRY OF MUSOMA

AT MUSOMA

CRIMINAL APPEAL NO 50 OF 2021

(Originating from Economic Case No 11/2020 of the District Court of Tarime)

JOSEPHAT MARWA @ MWITA ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

JUDGMENT

11th October, 2021 & 18th January, 2022

Kahyoza, J:

The district court of Tarime convicted **Josephat Marwa @Mwita** (the appellant) after a full trial with three offences; **one,** of unlawfully entry into the National Park; **two,** unlawful possession of the weapons in the national park, to wit, three trapping wires and one knife; and **three**, unlawful possession of government trophies. The trial court sentenced the appellant to pay a fine of Tzs. 100,000/= or serve a custodial sentence of six months in default for the offence in the first count; to pay a fine of Tzs. 20,000/= or serve one year custodial sentence for the offence in the second count and to twenty years' imprisonment for offence in the third count. It ordered the sentence to run concurrently.

Aggrieved, **Josephat Marwa @Mwita** appealed to this Court contending that the trial court erred in law and fact by not considering that the prosecution did not prove its case beyond reasonable doubt; that he was victimized for political reasons and that he was convicted in the

absence of an independent witness. The appellant complained further that the trial court did not evaluate the evidence or consider his defence.

This is the first appellate Court; thus, tasked with a duty to rehear and re-evaluate the evidence together with a duty to consider the appellant's grounds of appeal. (See **Alex Kapinga v. R.,** Criminal Appeal No. 252 of 2005 (CAT unreported). The appellant's appeal anchors on the following issues: -

1. Did the prosecution prove the appellant's guilty beyond reasonable doubt?
2. Was the appellant victimized for political reasons?
3. Were the prosecution witnesses reliable?
4. Was there a need for independent witness?
5. Did the trial court evaluate the evidence?
6. Was the appellant found in possession of government trophy?
7. Did the trial court consider the defence?

The trial court relied on the evidence of four prosecution witnesses to find **Josephat Marwa @ Mwita** guilty and convicted him with three counts to wit; **one,** unlawful entry into the National Park c/s 21(l)(a), (2) and 29(1) of the National Park Act, [CAP. 282 R. E 2002] (the **NPA**); **two**, unlawful possession of weapons in the National Park c/s 24(l)(b) and (2) of the **NPA**and **three,**unlawful possession of Government Trophies, contrary to section 86 (1) and (2) (c)(iii) of the Wildlife Conservation Act, [Cap. 283] (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] (the **EOCCA**).

The appeal was entertainedvia video link. The appellant fended for himself and Mr. Yesse Temba, learned State Attorney represented the respondent.

Did the prosecution prove the appellant's guilty beyond reasonable doubt?

The appellant complained without explanation that the prosecution did not prove its case beyond reasonable doubt.

Mr. Temba opposed the appeal. He submitted that the prosecution did establish its case beyond reasonable doubt.

One of the appellant's grounds of appeal is that the prosecution did not establish its case beyond reasonable doubt. This ground is a wide ground of complaint, which encompasses all grounds of appeal. The Court of Appeal discourages a practice of raising general ground of appeal together with specific ones. It stated however, that when the appellant raises the general ground of appeal together with specific ones it is proper for the appellate court to consider the general ground of appeal only to determine the appeal. The Court of Appeal pronounced that position of the law in **Rutoyo Richard vs R.,** (Cr. Appeal No.114 of 2017), published on the website, www.tanzlii.org [2020] TZCA 298, where it stated that: -

> *"Although we find it not to be a good practice for an appellant who has come up with specific grounds of appeal to again include such a general ground, but where it is raised as was the case in the present case,* ***it should be considered and taken to have embraced several other grounds of grievance****."*

The above being the position of the law, I will commence with the general ground of appeal that is whether the prosecution proved its case beyond reasonable doubt.

I will consider whether the prosecution proved the offence in the first count of unlawful entry into the National Park c/s 21(l)(a), (2) and 29(1) of the **NPA**. The provision of section 21 (1) (a) (2) of the **NPA** reads as follows-

1) Subject to the provisions of section 15, it shall not be lawful for any person other than–

(a) the Trustees, and the officers and servants of the Trustees; orto enter or be within a national park except under and in accordance with a permit in that behalf issued under regulations made under this Act.

(2) Any person who contravenes the provisions of this section commits an offence against this Act.

The Court of Appeal had an opportunity to consider the provisions of section 21 (1) (a) (2) of the **NPA** in **Dogo Marwa @ Sigana Versus Republic** Cr. App. No. 512 of 2019 CAT (unreported). It held that section21 (1) (a) (2) of the **NPA** does not create the offence of unlawful entry into the national park. It held-

"As far as we are concerned, the appellants were charged, tried, convicted, and sentenced for a non-existent offence of unlawful entry into Serengeti National Park."

Given the position of the law as propounded by the Court of Appeal I have no reason to delve into the issue whether there is evidence to prove the non-existent offence. I hold that the offence of unlawful entry into Serengeti National Park does not exists. It was therefore wrong for the trial court to convict the appellant with an offence which does not exist. I quash the conviction and set aside the sentence in the first count of unlawful entry into the national park.

I now, consider whether the prosecution proved the offence of the appellant was charged in the second count with the offence of unlawful possession of weapons in the National Park c/s 24(l) (b) and (2) of the **NPA.**The prosecution's evidence from Steven Sabai Mwita (**Pw1**), the arresting officer which was supported by the evidence of Paul Achieng Tongori (**Pw2**) was that the appellant was found in the national park in possession of weapons to wit; tree trapping wires and one knife. The appellant had no permit or proof that the weapons were not intended for hunting, killing or wounding. Steven Sabai Mwita (**Pw1**) told the trial court that he prepared seizure certificate indicating the area where the appellant was found and items found in possession of the appellant. He added that the appellant endorsed a thumb print. Steven Sabai Mwita (**Pw1**) tendered a seizure certificate as Exh.P.1. He deposed that he took the appellant and items seized to Nyamwaga police station. Steven Sabai Mwita (**Pw1**)'s evidence was supported by Paul Achieng Tongori (**Pw2**), who took part to arrest the appellant and G. 7499 DC Abel (**Pw3**). G. 7499 DC Abel (**Pw3**) deposed that he received the appellant and exhibits from Steven Sabai Mwita (**Pw1**). He interrogated the appellant and recorded the statements of park rangers who submitted the appellant to him.

I also went through the facts recorded during the preliminary hearing and found that the appellant admitted that park rangers took him to Nyamwaga police station with his exhibits which were three trapping wires, one knife and one hind limb fused with one side ribs of fresh zebra meat. The law states that facts admitted during the preliminary hearing are not required to be proved.

The appellant's defence was that he was arrested for political reasons. He deposed that he was member of CHADEMA political party and entered into conflict with the village chairman, a member of CCM started during the local government elections of 2019.

I was unable to buy the appellant's defence. The alleged chairman did not testify. I am unable to comprehend that a person who caused the appellant arrest did not testify. Given the evidence on record the appellant was arrested by Steven Sabai Mwita (**Pw1**) and Paul Achieng Tongori (**Pw2**). After his arrested, they took him to the police station where G. 7499 DC Abel (**Pw3**) received him with exhibits. Like the trial court, I find no reason to discredit Steven Sabai Mwita (**Pw1**) and Paul Achieng Tongori (**Pw2**). They are credible witnesses.

The appellant complained in the second ground of appeal that the trial court erred in law and in fact to convict him without evidence of an independent witness and in the third ground of appeal that the prosecution witnesses were not credible. There is no doubt that the prosecution's principal witnesses were park rangers. There was no independent witness.

Given the evidence on record, the appellant was found in the national park where it was unlikely to find an independent witness, that is a person who is not a park ranger. Not only that but also, the fact that the prosecution principal witnesses were all park rangers does not render their testimony less credible. It is the credibility of the witness which matters and not whether they are related or otherwise. I did not find any reason not to trust the prosecution witnesses. It is trite law that witnesses must be trusted unless, there is a reason to question their credibility. The

Court of Appeal in **Goodluck Kyando v. R.,**[2006] TLR 363 and in **Edison Simon Mwombeki v. R.,** Cr. Appeal. No. 94/2016, stated that-

> *"Every witness is entitled to credence and must be believed and his testimony accepted unless there are good and cogent reasons for not believing a witness."*

Steven SabaiMwita (**Pw1**) and Paul Achieng Tongori (**Pw2**) testified consistently that they saw the appellant in the national park arrested him whilst in possession of the government trophy and took him to Nyamwaga police station.

Finally, I find that there was ample evidence that the appellant was found with weapons in the national park for either hunting or killing animals. I uphold the conviction and sentence for the offence in the second count of unlawful possession of weapons in the National Park c/s 24(l)(b) and (2) of the **NPA.**

The remaining question is whether the prosecution proved that the appellant was in possession of government trophy. The appellant stood charged with the offence of unlawful possession of Government Trophies, contrary to section 86 (1) and (2) (c)(iii) of the Wildlife Conservation Act, [Cap. 283] (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] (the **EOCCA**) in the third count.

The prosecution evidence regarding the third count was that Steven Sabai Mwita (**Pw1**) and Paul Achieng Tongori (**Pw2**) found the appellant in possession of one hind limb merged with one side rib of fresh of meat of zebra. Njonga Marko William (**Pw4**), the District Wildlife Office on 19/02/2020 identified and evaluated the fresh meat which was suspect

to be government trophy as meat of zebra. Njonga Marko William (**Pw4**) prepared a valuation certificate, Exhibit P3. He prepared and tendered inventory form exhibit P4. The Exh.P.4 (inventory form) shows that the appellant appeared before the magistrate who gave him an opportunity to give comments. He stated-

> *"Joseph Marwa Mwita said that he was not found in possession of government trophies that are stated above"*

I examined the record and found that after Exp. P.3 and 4 were tendered the contents were not read to the appellant but the trial magistrate invited the witnesses to explain the contents of the documents. The trial magistrate recorded what was explained to the appellant. I find nothing wrong with what the trial court did reading the contents and explaining the contents to the appellant had the same implication of exposing the contents of documentary exhibits to the accused person. I hold that the exhibits were properly admitted.

I considered Exh.P.3 (an inventory form) and found that the magistrate who ordered the same to be disposed gave an opportunity to the appellant to give his views. It was mandatory for the magistrate to let the appellant give his views before the trophy was disposed. This position was stated in the case of **Mohamed Juma Mpakama v R.**, Criminal Appeal No. 385/2015 CAT (unreported).**An**inventory form may be prepared under paragraph 25 of the **Police General Orders** (the PGO) or under section 101 (1) of the **WLCA**. In the circumstance where the inventory is prepared under the PGO, 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."

In the present case, the inventory was prepared under PGO and the disposal of the trophy was ordered in the presence of the appellant and after he was given an opportunity to comment. I, therefore find that the same was properly prepared and admitted.

The next question I asked myself is whether the trophy was properly identified and valued. Steven Sabai Mwita (**Pw1**) and Paul Achieng Tongori (**Pw2**) who were park rangers and Njonga Marko William (**Pw4**) a district wildlife officer deposed that they identified the meat the appellant possessed as that of a zebra. Meat was fresh so easy to identify. The meat was hind limb joined with ribs. All three witnesses were experienced persons in dealing with wild animals. Given the nature of the meat I have no doubt that the meat was that of zebra thus, the government trophy.

The next question is whether the trophy's value was established. Section 86(4) of the **WLCA**, provided that a certificate of the wildlife officer stating the value shall be admissible in evidence and shall be *prima facie* evidence of facts stated therein. It reads-

> *86(4) In any proceedings for an offence under this section, a certificate signed by the Director or wildlife officers from the rank of wildlife officer, stating the value of any trophy involved in the proceedings shall be admissible in evidence and shall be* ***prima facie*** *evidence of the matters stated therein including the fact that the signature thereon is that of the person holding the office specified therein.*

In the present case, Njonga Marko William (**Pw4**) a district wildlife officer valued the trophy, prepared a trophy valuation certificate, and tendered it as Exh.P.3. I have no doubt that Njonga Marko William (**Pw4**)a district wildlife officer was competent to value the trophy, as he is among officers authorized to issue a trophyvaluation certificate as per the mandatory dictates of sections 86(4) and114(3) of the **WLCA**. Sections 86(4) and114(3) of the **WLCA** require the certificate of trophy evaluation to beissued by either the Director of Wildlife or any Wildlife officer.Section 3 of the **WLCA**defines wildlife officer aswildlife officer, a wildlife warden and a wildliferanger engaged for the purposes of enforcing theAct. Njonga Marko William (**Pw4**) is a wildlife officer working at the district level. I am of the firm opinion that the Exp. 3, the trophy valuation certificate was properly admitted.

The appellant complained that he was victimized for political reasons. I have already stated such allegation is too weak. There is no evidence to suggest that the appellant was victimized. The state attorney submitted such a complaint was baseless. I totally agree with him.

The appellant complained further that the prosecution witnesses were not reliable and that there was need for an independent witness. I stated while discussing whether the prosecution established the offence in the second count that there was nothing to suggest that the prosecution witnesses were not credible to require an independent witness. In addition, the evidence on record shows that the appellant was found in the national park where there little chance to find an independent witness. I find the complaint baseless. I find the prosecution witnesses credible.

The appellant complained in the magistrate failed to evaluate the evidence and that he neglected to consider his defence in the fourth and six grounds of appeal respectively. The state attorney countered the complaints, submitting that the trial magistrate evaluated and considered the appellant's defence.

I perused the record and found that the appellant's defence regarding the second count was considered and this is reflected on page 10 of the typed proceedings where the trial magistrate stated that the appellant's defence is an afterthought.

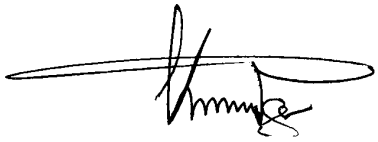
Regarding the third count, the appellant's defence was also considered as the trial magistrate stated that the appellant did not present evidence to support his allegation and his defence did not contradict the prosecution evidence. That said, it is safe to hold that the appellant's defence was considered and his complaint is meritless.

Finally, I uphold the appeal against the conviction and sentence for the offence in the first count. I quash the conviction and set aside the sentence imposed regarding the offence of unlawful entry into the National Park c/s 21(l)(a), (2) and 29(1) of the National Park Act, [CAP. 282 R. E 2002] (the **NPA**).

I dismiss the appeal in relation to conviction and sentence of the appellant with the offences of unlawful possession of weapons in the National Park c/s 24(l)(b) and (2) of the **NPA** and unlawful possession of Government Trophies, contrary to section 86 (1) and (2) (c)(iii) of the Wildlife Conservation Act, [Cap. 283] (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] (the **EOCCA**). I uphold the conviction of the appellant with in the offence second and third counts and the ensuing sentence.

I so order.

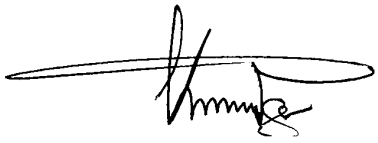


J. R. Kahyoza,

Judge

18/01/2022

Court: The Judgment delivered in the virtual presence of the appellant and Mr. Temba S/A for republic. B/C Ms. Neema present.

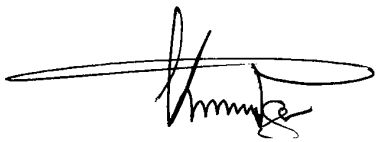


J. R. Kahyoza

JUDGE

18/01/2022

Court: Right of appeal after lodging a notice within 30 days explained.



J. R. Kahyoza

JUDGE

18/01/2022