

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

**CRIMINAL APPEAL NO. 25 OF 2021**

*(Arising from Economic Case No. 81 of 2017 of the District Court of Bariadi at  
Bariadi)*

**MASUNGA MGEMA @ KITULWA.....APPELLANT**

**VERSUS**

**THE REPUBLIC.....RESPONDENT**

*7<sup>th</sup> June & 15<sup>th</sup> July 2022*

**MKWIZU, J.:**

The appellant, Masunga Mgema @ Kitulwa was before Bariadi District Court tried and convicted on four counts of unlawful entry into the National Park contrary to sections 21(1) and (2) and 29 of the National Park Act, (Cap 282 RE 2002) as amended by Act No. 11 of 2003 read together with GN No 235 of 1968; Unlawful possession of weapons in the National Park contrary to sections 24(1)(b) and (2) of the National Park Act, read together with GN No 235 of 1968; Unlawful Hunting in the National Park contrary to sections 16(1) (2) (a) and 29 of the National Park Act, read together with GN No 235 of 1968 and paragraph 14 of the 1<sup>st</sup> schedule to and section 57 (1) and 60(2) and (3) of the Economic and organized Crime Control Act, (Cap 200 R E 2002) as amended by Section 14 and 16 of the Written Laws( Miscellaneous Amendments) Act No.3 of 2016; And unlawful possession of Government Trophies contrary to section 86(1), (2) (b) of the WCA No. 5 of 2009 read together with paragraph 14 of the first schedule to and section 57 (1) and 60 (2)and

(3) of the EOCA as amended by section 13 and 16 of the Written Laws (Miscellaneous Amendments) Act No. 3 of 2016.

The particulars of offences in all counts are that: on 10/08/2017 at about 23.00 hours at Mbarageti River area in Serengeti National Parks within Bariadi District in Simiyu Region, the appellant was found hunting animals namely one zebra in the National Park. The appellant was thus found in possession of weapons namely a knife and five trapping wires and government trophies to wit two fore and hind limbs of Zebra, one head of zebra, and one tail of zebra equal to one animal killed valued at USD 1,200 equivalent to TZS 2,686,272/=.

Emanuel Bwire Wawili (PW1), a Park Ranger stationed at Duma rangers Post in Serengeti National Park, testified that on 10/8/2017, he and his fellow park rangers while on patrol at Serengeti National Park saw torch light by far and on following up, they managed to arrest the appellant with fresh four legs, one head, and one tail all the zebra. They also found the appellant with one knife and five trapping wires and that he failed to avail them with a permit. According to this witness, they took the appellant to Duma Park rangers with all his exhibits, and on the following day, they conveyed the appellant to Bariadi police station and handled the appellant together with all the exhibits to the police and a police officer file No Bariadi IR 1365/2017 was opened. The weapons and the trapping wires were tendered as exhibit P1.

PW3 is one F 1976 DC Kalson, whose testimony was on his assignment to investigate the matter which began on 11/8/2017 at around 15.45 through Police Case file No BR 1365/2017. He first took the appellate from the police lockup, for interrogation but he said, the appellant denied

commission of the offense. Since the appellant was arrested with trophies, PW3 said he called the wildlife officer for valuation.

David Gilong Sule (PW2) a wildlife officer at Bariadi assigned the task of assessing the value of the Government trophy allegedly found in the appellant's possession. He prepared and tendered the Trophy Valuation Certificate as exhibit P2. The trophies were perishable as they were found fresh. They were for that reason disposed of and the disposition order was tendered in court as exhibit P3.

In his defence, the appellant distanced himself from the prosecution's accusations. He said he was arrested on his way to Duma River to take bath.

After a full trial appellant was found guilty on the 1<sup>st</sup>, 2<sup>nd</sup>, and 4<sup>th</sup> counts, convicted and accordingly sentenced. He was however acquitted on the 3<sup>rd</sup> count. Dissatisfied with both conviction and sentence, the appellant lodged this appeal on five grounds of an appeal raising three main complaints; (i) *the prosecution case was not proved beyond a reasonable doubt*, (ii) *failure by the trial court to evaluate the evidence and (iii) non-consideration of the appellant's defence.*

At the hearing of the appeal, the learned State Attorney Ms. Shani appeared for the respondent /Republic while the appellant was in person without legal representation. The Appellant had nothing to say except his prayer for the consideration of his grounds of appeal.

At the outset of his address, the learned State Attorney supported the appeal against the 4<sup>th</sup> count. She bluntly faulted the procedure adopted by the trial court in disposing of the perishable trophies without affording

the appellant an opportunity to be heard. Relying on the decision of **Said Lyangubi V R**, Criminal Appeal NO 324 of 2017, the learned State Attorney argued that the involvement of the accused person during the disposition of the exhibit is of great value.

She also invited the court to expunge from the records exhibit P3, inventory order, and Trophy valuation certificate (exhibit P2), for failure by the trial court to read out its contents after admission.

The learned State Attorney was of the view that, the exclusion of the above exhibits leaves the record without traces of the offence on unlawful possession of trophies upon which conviction and sentence on the 4<sup>th</sup> counts would stand. He said the only evidence left intact is in respect of the 1<sup>st</sup> and 2<sup>nd</sup> counts where the appellant is charged for unlawful entry in the National Park carrying with him, weapons.

I have carefully considered the grounds of appeal, submissions of both sides, and the records. Indeed, the actual disposition of the trophies allegedly found with the appellant was executed on 14/8/2017 in the presence of the appellant. On what transpired before the court on that date, the records show:

*"Mr. Msuya: I pray to move the court outside court premises so as to see the trophies I also pray for a disposal order as they had already begun to decay.*

**M.P. Mrio – SRM**  
**14/8/2017**

**Court:** *Prayer granted.*

**M.P. Mrio – SRM**  
**14/8/2017**

**Court:** *We moved outside court premises while with the accused person, PP, Court Clerk, police where we managed to*

*see one fresh head of Zebra (with stripes black of white), 4 fresh legs of Zebra with stipes black and white, one fresh fail of Zebra with black on white stripe where it was cut (on top). Already began to smell so much.*

***M.P. Mrio – SRM  
14/8/2017***

***Order:*** *I order them to be disposed off*

***M.P. Mrio – SRM  
14/8/2017***

***Order:*** *Mention on 28/8/2017*

*AFRIC.*

***M.P. Mrio – SRM  
14/8/2017”***

However, though the appellant’s physical attendance was procured during the disposition of the government trophy, he was not afforded the opportunity to be heard. The transaction was only executed between the trial magistrate and the prosecution. There is no invitation for the appellant to express his views on the made application by the prosecution before issuing a disposition order. In **Mohamedi Juma @ Mpakama V Republic**, Criminal Appeal No 385 of 2017, CAT (Unreported) the appellant was denied an opportunity to be heard before the issuance of a disposition order, like in this case, the Court of Appeal at page 23 of its typed decision said:

*"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 PE3). ... the resulting Inventory Form (exhibit PE3) cannot be proved against the*

*appellant because he was not given the opportunity to be heard by the primary court Magistrate. ...”*

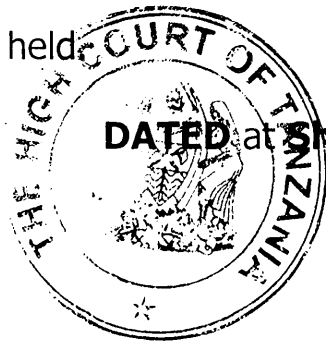
I thus, support the State Attorney's submissions that the process of disposal of the seized meat was irregular.

Yet again, it is also true as rightly submitted by the learned State Attorney that both the inventory form and valuation certificate Exhibits (P3 and P2) were not read out and or explained to the appellant after their admission as exhibits subject to be expunged out from the records as I hereby do. Conviction on the 4<sup>th</sup> court is thus not supported by evidence.

The next question is whether the remaining evidence is strong enough to establish the appellant's culpability on the 1<sup>st</sup> and 2<sup>nd</sup> Count. While the appellant was found in the national park as he, himself admitted in his evidence, the rest of the prosecution evidence does not support the accusations in the second count. PW1 explained to the court how the appellant was arrested claiming to have found him with a knife and five trapping wires. These exhibits together with the appellant were taken to Duma Rangers post and later to Bariadi Police and handled to the police. Unfortunately, neither the person who handled the said exhibit nor the exhibit keeper was paraded in court to validate this statement. It is even not disclosed how the said exhibit got in Court during trial. When tendering the exhibits in court PW1 said he got the exhibit from the police without more details. The exhibits were also tendered without showing any special mark that connects them with the incidents on which they were **seized**. Generally, the prosecution evidence is short of an account of the chain of custody of exhibit P1. It is thus expunged from the records.

That done, there is no evidence on the records to establish the offence of unlawful possession of weapons in the national park.

That said, I partly allow the appeal, quash the conviction, and set aside the sentence meted against the appellant on the 2<sup>nd</sup> and 4<sup>th</sup> counts. The only valid conviction is in relation to count one on which, the appellant was sentenced to a fine of 100,000/= or one-year imprisonment term on 26/2/2018, meaning that by today he has completed serving the sentence resulting to his immediate release from prison unless otherwise lawful held.



**DATED** at Shinyanga this 15<sup>th</sup> day of July 2022.

*E. Y. Mkwizu*  
**E. Y. MKWIZU**

JUDGE

15/07/2022

**COURT:** Right of appeal explained

*E. Y. Mkwizu*  
**E. Y. MKWIZU**

JUDGE

15/07/2022