IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MUSOMA DISTRICT REGISTRY

AT MUSOMA

CRIMINAL APPEAL NO. 140 OF 2021

(Arising from Economic Case No. 120 of 2020 of the District Court of Serengeti at Mugumu)

BETWEEN

PETER S/O KARORI @ NYANDORO..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

23rd March & 11th May, 2022.

A. A. MBAGWA, J.:

This is an appeal against conviction entered by and sentence meted out by the District Court of Serengeti at Mugumu.

The appellant, Peter Karori @ Nyandoro along with other three namely, Juma s/o Joseph Magange, Saimon s/o Petro Mairo @ Babu and Mahege s/o Witare @ Nyamakoro were jointly arraigned before the District Court of Serengeti at Mugumu on an indictment containing five courts.

In the 1st count they were jointly charged with Unlawful Entry into the Game Reserve contrary to section 15(1) and (2) of the Wildlife Conservation Act No. 5 of 2009 whereas in the second count they were charged with Unlawful

Possession of Weapons in the Game Reserve contrary to section 17(1) and (2) of the Wildlife Conservation Act No. 5 of 2009. In the third, fourth and fifth counts they were charged with Unlawful Possession of Government Trophies contrary to section 86(1) and (2) of the Wildlife Conservation Act No. 5 of 2009 read together with paragraph 14 of the First Schedule to, and sections 57(1) and 60(2) of the Economic and Organised Crime Control Act [Cap.200 R.E. 2019].

All the accused persons pleaded not guilty hence the matter inevitably proceeded to a full trial. In a bid to prove the accusations, the prosecutions paraded a total of four witnesses namely, Pinetal Mafyele, a game warden (PW1), Hamis Ncheye, a game warden (PW2), Wilbroad Vicent, a wildlife officer (PW3) and H.3802 D/C Yunus, police investigator (PW4). In addition, the prosecution produced four (4) exhibits namely, certificate of seizure (PE1), one panga and two knives allegedly found with the accused (PE2), trophy valuation certificate (PE3) and inventory order dated 20/10/2020 (PE4).

The accused, on their part, fended themselves. They did not call other witnesses nor did they produce any exhibit.

The prosecution account was to the effect that on 19th day of October, 2020 at Bonde la Manchira within Ikorongo Game Reserve, PW1, PW2, Dickson Omary and Benson Raizer, while on patrol, saw human footprints. They thus traced the footprints up to where the accused were. According to PW1 and PW2, the accused were found resting under the tree within the game reserve. The accused had in possession of weapons namely, one panga and two knives. Besides, the accused were in possession of government trophies to wit, one fresh head of eland, one piece of fresh eland skin and two pieces of fresh eland meat. They also had three carcasses of warthog and fourteen eggs of ostrich.

Consequently, PW1 and PW2 arrested the accused and seized the items mentioned. The seized items were then listed in the seizure certificate (PE1) which was signed by both the arresting officers and the accused. PW1 tendered in evidence seizure certificate (PE1) as well as one panga and two knives (PE2). According PW1, thereafter, the accused were taken to Mugumu Police Station. It is the evidence of PW3, a wildlife officer that on 20th October, 2020 he went to Mugumu Police Station where he identified and valued the government trophies. He confirmed that the alleged trophies were indeed eland, warthog and fourteen eggs of ostrich as such he filled a trophy

valuation certificate which he tendered as PE3. On the same day, soon after valuation exercise, PW4 D/C Yunus, the police investigator prepared an inventory and took the accused together with the trophies before the magistrate for disposal as the trophies were prone to decay. According to PW4, the magistrate ordered the trophies to be disposed of in the presence of the accused. PW4 tendered an inventory form and the same was received and marked as PE4.

In defence, all the accused denied the allegations. They stated that on the fateful day they had gone to Manchira River to wash their clothes. They said that Manchira River is outside the game reserve. However, the accused stated that, to their dismay, PW1 and PW2 as well as their cronies arrested and took them to Mugumu Police Station.

Upon closure of the evidence for both sides, the trial magistrate was satisfied that the prosecution case was proved beyond reasonable doubt against all the accused in all five counts. Consequently, all the four accused were convicted of Unlawful Entry into the Game Reserve in 1st count, Unlawful Possession of Weapons in the Game Reserve in the 2nd count and Unlawful Possession of Government Trophies in the 3rd, 4th and 5th counts.

It is also important to note that the 1st accused Juma Joseph @ Manage and 2nd accused Peter Karori Nyandoro were sentenced to serve one year imprisonment for the 1st and 2nd counts and twenty (20) years imprisonment for the 3rd, 4th and 5th respectively whilst the 3rd accused, Saimon Petro Mairo @ Babu and 4th accused, Machege Witare @ Nyamakori were discharged on condition that they should not commit any criminal offence within the period of one year.

The 2nd accused who is now the appellant in this appeal was aggrieved by both conviction and sentence hence he appealed to this Court. He filed a petition of appeal containing the following grounds:

1. That the offence of unlawful entry into the game reserve and that of unlawful Possession of Weapons in the Game Reserve were not proved to the required standard in the criminal cases.
2. That, the chain of custody of exhibit PE1 (certificate of seizure), PE2 (weapons to wit, one panga and two knives), PE3 (a trophy valuation certificate), PE4 (inventory form) were not established and hence the appellant was wrongly implicated and convicted on the offence charged against him.

3. That, the prosecution witnesses were not credible to be believed and hence the trial Court wrongly relied on the prosecutions witness to convict the appellant
4. That, as a whole the charge against the appellant was not proved beyond reasonable doubt.

When the appeal was called on for hearing, the appellant appeared through a video conference from the prison and he was represented by Cosmas Tuthuru, learned counsel who was physically present in court. The respondent/Republic had the services of Isihaka Ibrahimu, learned State Attorney.

Submitting in support of the 1st ground, Mr. Tuthuru said that the offence of entry into game reserve and Unlawful Possession of Weapons in the Game Reserve were not proved to the required standard. The counsel elaborated that at page 17 and 21 of the proceedings, PW1 and PW2 testified that the appellant was found at Ikorongo Grumet Game Reserve in possession of government trophy while the appellant said that he went to Manchira river to wash his clothes and that place is outside the game reserve.

Mr. Tuthuru argued that PW1 and PW2 ought to explain the boundaries of Ikorongo Game Reserve and the right place where the appellant was found. To bolster his argument, the appellant's counsel referred to the case of **Cheyonga Samson @ Nyambare vs the Republic,** Criminal Appeal No. 510 of 2019, CAT at Musoma at page 14 and 15.

The appellant's counsel further contended that failure by the prosecution to cross examine the appellant, connotes that he was found outside the game reserve and without government trophy. In addition, Mr. Tuthuru said that the arresting officers, PW1 and PW2 did not explain the boundaries of the game reserve. This was cleared by the Court of Appeal at page 5 in Cheyonga case (supra). Mr. Tuthuru was opined that the prosecution ought to bring evidence of GPS which could have been used to demonstrate the location at which the appellant was found by the arresting officers. He therefore concluded that the offences of unlawful entry and unlawful possession of weapon in the game reserve were not proved.

With regard to the 2nd ground, the appellant's counsel submitted that chain of custody of exhibit PE1 was not properly established hence the appellant was wrongly convicted. He said exhibits PE1 certificate of

seizure, PE2 panga and knife, PE3 a trophy valuation certificate and PE4 inventory form had no documentation or paper trail. The counsel further submitted that, according to PGO 229 directive No. 31, the exhibit ought to be accompanied by a police form No. 145. He said that the relevancy of police form No. 145 was explained in the case of **Malumbo vs Director of Public Prosecutions** East Africa Law Report [2011]1 EA.

Furthermore, the counsel insisted that the exhibits which can easily change hands should be well documented and he relied on the case of **Kadiria Said Kimaro vs the Republic**, Criminal Appeal No. 301 of 2017, CAT at Dar es Salaam. Finally, the appellant's counsel prayed the court to expunge all the exhibits.

With respect to 3rd and 4th grounds, the appellant's counsel opined that the prosecutions witnesses ought not to be believed. He lamented that PW1 and PW2 failed to explain where they found the appellant. The counsel told the Court that credence of witness is assessed based on the whole evidence as such, by failing to demonstrate on the boundaries of the game reserve, their credibility was dented.

The appellant's counsel criticized PW3 that he did not tell the court his experience in examining and identifying various government trophies nor did PW4 tell the court whether the appellant was involved in disposing of the government trophies. The counsel continued to lament that the appellant was not asked whether he recognized the meat (government trophies).

In conclusion, the appellant's counsel prayed the court to allow the appeal, quash conviction and set aside the sentence.

In rebuttal, Mr. Isihaka Ibrahimu, learned State Attorney was in full support of conviction and sentence. He submitted that, in the first ground, the offences of unlawful entry into game reserve and unlawful possession of weapons in the game reserved were proved through PW1 and PW2 as well as exhibits PE1, 2, 3, and 4. He submitted that the PW1 and PW2 told the court that the appellant was found inside **Ikolongo Game Reserve** as such, there was no need to explain on the boundaries after they told the court that the appellant was in the game reserve. The learned State Attorney further said that the contention that the appellant was found outside the game reserve was an afterthought. He concluded that the first ground is devoid of merits.

On the 2nd ground, he submitted that as per the case of **Kadiria (supra)**, the issue of paper trail is not mandatory. He said that paper trail is only necessary where the exhibits can easily change hands. He was opined that the exhibits tendered could not be easily tampered with. In addition, Mr. Isihaka Ibrahimu submitted that appellant did not dispute his signature on the certificate of seizure. The State Attorney stressed that it was very difficult for PW1 and PW2 to observe paper trail because they arrested the accused in the game reserve. He opined that much as there is a certificate of seizure, it goes without saying that the appellant was found with the seized items. The State Attorney further said that it is not always the case that where there is contravention of law, the exhibit should be expunged. He cited the case of **DPP vs James Msumule Jembe & 4 others**, Criminal Appeal No. 397 of 2018, CAT at Iringa at page 13 where the Court of Appeal held that not every contravention of the Criminal Procedure Act automatically leads to exclusion of the evidence in question. Mr. Ibrahimu concluded that oral account of PW1 and PW2 as well as the seizure certificate sufficiently established chain of custody.

In addition, Mr. Ibrahimu argued that, during his defence, the appellant did not say anything in relation to the exhibits. As such, the prosecution evidence remained unchallenged, he opined. Finally, the State Attorney submitted that the second ground is without merits.

Regarding the 3rd and 4th grounds, the State Attorney submitted that all the prosecution witnesses were credible. He said that there are no material contradictions in their evidence nor did the trial magistrate question their demenour. He relied on the case of **Elisha Edward vs Republic,** Criminal Appeal No. 33 of 2018, CAT at Shinyanga at page 6 to support his argument.

Finally, the State Attorney prayed the Court to dismiss the appeal.

In rejoinder, Mr. Tuthuru admitted that the appellant signed a certificate of seizure but he complained that it did not have exhibit label. He also said that the appellant testified that the exhibits were planted.

Furthermore, the appellant's counsel maintained that PW1 and PW2 did not demonstrate on the boundaries of the game reserve.

I have had an occasion to canvass the rival submissions as well as the record of appeal.

To start with the 1st ground which challenges conviction in respect of unlawful entry into the game reserve and unlawful possession of weapons in the game reserve. It is a common ground that proof of the foregoing counts is dependent on the evidence that the appellant was found within the game reserve. PW1 and PW2 simply testified that they found the appellant and his associates at Bonde la Manchira area within Ikorongo Game Reserve whereas the appellant claims that he was found at Manchira river where he was washing his clothes. The appellant's counsel argued that mere oral accounts of PW1 and PW2 were not sufficient to prove that the appellant was found within the game reserve. In the case of **Cheyonga Samson @ Nyambare vs the Republic**, Criminal Appeal No. 510 of 2019, the Court of Appeal held that mere narration that the appellant was arrested inside the Ikorongo Game Reserve without demonstrating the area of the arrest to be within the statutory boundaries of the game reserve was not sufficient proof. Admittedly, in this case no any demonstrative evidence was adduced to establish that the appellant and his conspirators were found and arrested within the game reserve. As such, I agree with the appellant's counsel that the appellant was wrongly convicted of Unlawful Entry into the Game Reserve and Unlawful

Possession of Weapons in the Game Reserve. Consequently, I quash convictions and set aside the sentences in respect of the two offences. I thus allow the 1st ground of appeal.

In the 2nd ground, the appellant complains that chain of custody was not sufficiently established in that there was no paper trail showing the movement of exhibits from the day of seizure to the day they were tendered in court. In response, the State Attorney argued that paper trail was not mandatory in the circumstances of the case. It is undisputed that the trophies which the appellant and his conspirators were found with were disposed of after obtaining court order. I have glanced at the inventory order dated 20/10/2020 (exhibit PE4) and found that the appellant was present before the magistrate when he made a disposal order. This is exhibited by the fact that the appellant and other accused persons signed at the back of the inventory order (PE4). Furthermore, exhibit PE2 to wit; one machete and two knives were listed in the seizure certificate (PE1) upon arrest of the appellant. Moreover, PE2 was identified by both PW1 and PW2 as the items which they seized from the appellant. It is a trite law that chain of custody can be established orally. See the case of **Yusuph Masalu & 3 others vs the Republic**, Criminal

Appeal No. 163 of 2017, CAT at Dodoma, P17. Thus, on account of PW1, PW2, PW4 as well as exhibits PE1, PE2 and PE3, I find that the chain of custody was sufficiently established. The second ground is therefore devoid of merits.

In the 3rd ground of appeal, the appellant lamented that the prosecution witnesses were not credible because they failed to demonstrate the boundaries of the game reserve. In contrast, the respondent's counsel dismissed the complaint stating that there were no contradictions in their evidence. The State Attorney further submitted that there were no negative comments on their demenour by the trial magistrate. It is a settled position of law that every witness is entitled to credence and must be believed unless there are good reasons to do so. See the case of **Goodluck Kyando vs Republic [2006] T.L.R. 363.** I have keenly gone through the testimonies of all four prosecution witnesses but failed to grasp any reason for disbelieving them let alone a good one. Failure to demonstrate the boundaries of the game reserve may be a ground to show weakness in the prosecution evidence but it is not a reason for disbelieving a witness. Therefore, I find this ground without merits and accordingly, I dismiss it.

In the 4th ground, the appellant contended that the charge against the appellant was not proved. I have already deliberated on the counts of Unlawful Entry into the Game Reserve and Unlawful Possession of Weapons in the Game Reserve in the 1st ground of appeal. I will therefore determine this ground in respect of three counts of Unlawful Possession of Government Trophies. The prosecution evidence is the effect that the appellant and his associates were found with three types of government trophies namely, one fresh head of eland, one piece of fresh eland skin and two pieces of fresh eland meat, three carcasses of warthog and fourteen eggs of ostrich. These trophies were seized and listed in the seizure certificate (PE1) to which the appellant signed. Further, the said trophies were identified and valued by PW3 before PW4 submitted them to the magistrate for disposal order. The inventory form (PE4) at the back tells it all that the magistrate made a disposal order in the presence of the appellant and his confederates. In view of the prosecution evidence as highlighted above, I am of unfeigned findings that the offences of unlawful possession of government trophies in the 3rd, 4th and 5th counts were proved beyond reasonable doubt. I therefore uphold conviction and

sentence of twenty (20) years imprisonment in respect of 3rd, 4th and 5th counts of unlawful possession of government trophies.

Save for the 1st ground, this appeal is dismissed.

Before I conclude this judgment, it is apposite, I think, to register my observation with regard to the sentence imposed on the two accused namely, Saimon s/o Petro Mairo @ Babu and Mahege s/o Witare @ Nyamakoro. These two persons, like the appellant, were convicted of all five counts including three counts of unlawful possession of government trophies. Dismally, whereas the appellant was sentenced to twenty years imprisonment for unlawful possession of government trophies, the two accused mentioned above were conditionally discharged. In my view, this sentence was illegal for unlawful possession of government trophies is an economic offence in terms of paragraph 14 of the First Schedule to, and section 57(1) and 60(2) of the Economic and Organised Crime Control Act which attracts a minimum sentence of twenty (20) year imprisonment. See also the case of **Ng'waja Joseph Sarengeta @ Matako Meupe vs the Republic**, Criminal Appeal No. 417 of 2018. However, since the appeal before me only involves the appellant and much as the Republic

has not appealed against sentence of conditional discharge, I make no order in that regard.

In fine, the appeal is dismissed to the extent indicated.

It is so ordered.

Right of appeal is explained.

A. A. Mbagwa

JUDGE

11/05/2022

Court: The judgment has been delivered in the presence of the appellant, and Nimrod Byamungu learned State Attorney for the Republic, this 11th day of May, 2022.

A. A. Mbagwa

JUDGE

11/05/2022