**IN THE HIGH COURT OF TANZANIA**

**DISTRICT REGISTRY OF SHINYANGA**

**AT SHINYANGA**

**CRIMINAL APPEAL NO. 80 OF 2021**

*(Arising from the District Court of Bariadi Economic case no. 37 of 2020 before Hon. C.E. KILIWA-RM)*

**NKULA S/O NKUBULA @NKOSA @ NGUSA.....APELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

*Date of last order - 21st Sept 2022*
*Date of judgment - 3rd Oct. 2022*

**NONGWA, J.**

The appellant NKULA S/O NKUBULA @ NKOSA @NGUSA had been charged, convicted and sentenced to twenty (20) years term of imprisonment after being found guilty with four counts; first count of unlawful entry into the National Park, second count unlawful possession of weapon in the National Park and two counts of unlawful possession of Government trophy, Contrary to section 21 (1) (a) and (2) section 29 (1) of the National Park Act [Cap 282 R.E 2002] as amended by the written laws (miscellaneous Amendments) Act No. 11 of 2003, Section 86 (1) and (2) (b) (c) ii, Section 103 of the Wildlife Conservation Act No. 5 of 2009, Paragraph 14 of the first Schedule to, and section 57 (1) and 60 (2), of the Economic and Organized Crime Control Act [Cap 200 R.E 2019].

The particulars in a nutshell as seen in the records are that the appellant, on the 28th July 2020 he was found unlawfully into Serengeti

National Park. He was found at Duma river while in possession of one knife, five animal trapping wires one Machete, four pieces of dry Zebra meat, one dry Zebra skin and one dry Impala skin.

Upon being aggrieved, the appellant lodged four grounds of appeal so as to rescue himself from the prison where he was to suffer 20 years term of imprisonment, I wish to reproduce the grounds as read from his appeal;

i. *'The trial magistrate erred in law and fact to pass a sentence without complying with the provision of the laws.*
ii. *The trial magistrate erred in law and in fact to hold conviction on weak evidence and contradictory evidence of public witness thus create doubts that the evidence was proved to the standard stipulated by the law.*
iii. *The trial magistrate erred both in law and fact by convicting him without complying with the provision of the laws.*
iv. *The case was not proved to the standard required by the Laws hence it left the shadow of doubt.'*

The background of what transpired from the records in a nutshell are that NKULA S/O NKUBULA @ NKOSA @NGUSA on 28th day of July, 2020 at Mto Duma area in Serengeti National Park within the District of Bariadi in Simiyu Region was alleged to have entered into the Serengeti National Park without the permission of the Director thereof previously sought and obtained. It is also alleged that while there, he was found in unlawful possession of weapon to wit: - one knife, one Panga and five animal trapping wires without the permit and failed to satisfy the authorized officers that the same were not intended to be used for

purpose other than hunting, killing, wounding or capturing of wild animals. Moreover, that he was found in unlawful possession of Government trophy to wit, four dried pieces of Zebra meat and one dried skin of Zebra, equivalent to one zebra unlawfully killed valued at USD 1200 equivalent to Tsh. 2, 782,800/=, one dried skin of Impala equivalent to one Impala unlawful killed valued at USD 390 Equivalent to Tsh, 906,750/= all being the properties of the Government of the United Republic of Tanzania.

The prosecution paraded four witnesses to prove the allegations. PW1 Romward Francis, Park Ranger stated to have arrested the accused person while he was on patrol at Duma River together with Michael Komba and Raphael Ali. They saw a trapping wire and footmarks, followed them and found the appellant hiding while in possession of the items named above without any permit. PW1 filled the seizure certificate and signed, he tendered the machete, knife and five trapping wires and seizure certificate, the court marked as exhibit P1 and P2 respectively.

PW2, Michael Komba, also Park Ranger had nothing than similar to what PW1 stated. PW3 Michael Shirima, Wildlife officer of Maswa Game Reserve, identified and evaluated the Zebra and Impala skin together with the four pieces of meat he concluded to be Zebra meat. He also applied for the court order for destruction of the trophies due to them being perishable and about to decay, the valuation report was received and marked exhibit P3 while the inventory form as P4.

PW4 was the investigator who recorded the statement of the appellant and other prosecution witnesses, he said that the accused person admitted some of the facts and disputed some.

On his defence, the appellant was the only witness, the appellant denied to have been found in the National Park or to have been in possession of the alleged trophies of weapons. He said that his house at Mwasinasi is very close to the National Park, on 26th July 2020, his children had gone for firewood and they were arrested by the rangers and went to his home together, released the children and took him to Nselya station in the National Park. That they asked the list of names of poachers but he had none, he was then shifted to Duma station on the 28th July 2020 and sent to Bariadi Police station then to Court on 15th August 2020.

When the appeal was placed for hearing before me, the appellant appeared in person, unrepresented. The Learned State Attorney Mr. Enosh Kigoryo, represented the respondent Republic. When called upon to argue his appeal, the appellant, standing for himself did no more than to request for the adoption of the four grounds in the petition of appeal earlier filed. He thereafter opted to hear the response of the Republic.

At the very outset of his response, the learned state attorney, Mr. Enoshi Kigoryo maturely, supported the appeal. His concession to the appeal was not nailed exactly on the four grounds of appeal but on the 4th ground only of which was disposing all other grounds, that the case was not proved to the standard required by the law hence it left shadows of doubts. The learned State Attorney submitted that, after going through the chargesheet and the proceedings, the Republic was hesitant in convincing the Court that the offence was proved beyond reasonable doubt, as such he found wise and prudent to concede with the appeal.

He pointed out that on the 1st count named unlawful entry into the National Park, that offence does not exist on the reason that S. 21 (1) (a) and (2) it does not create an offence. Referring to the case of **Willy**

**Kitinyi @Marwa, Criminal Appeal No. 511 of 2019** Court of Appeal at Musoma (unreported) where the Court held that S. 21 (1) (a) (2) of the National Park Act does not create offence and the defects was not curable under S. 388 of the CPA.

The learned state Attorney went on submitting on the second count that, after going through the evidence of Prosecution he found no evidence showing that the place the applicant was found is a reserve area and that as per Willy Kitinyi's Case (Supra) at page 11 last paragraph, the prosecution had duty to establish that the appellant was actually found on the game reserve, as such the rest of the counts had no limb to stand on. The State Attorney however, satisfied this court on the 3rd and 4th grounds which resembled each other that is being found with government trophies that were brought before the trial court through an Inventory "P4", which was alleged to have been issued upon order for destroying the items. He said that nowhere the appellant is seen to have witnessed or signed the inventory and as per **Willy Kitinyi's** case (Supra) the said Exhibit "P4" was illegally prepared. In **Willy Kitinyi's** case (Supra) the Inventory form exhibit P.E.3 could not be proved against the appellant who did not take part in the process of its preparation. In that case the Court of Appeal acknowledged position in the case of **Mohamed Juma @ Mpakama vs Republic, Criminal Appeal No. 385 of 2017** (unreported) cited by the learned State Attorney, to support his position that the procedure was violated.

In the case cited above by the learned State Attorney, after referring to the powers of the Police, under paragraph 25 of the PGO to obtain a disposal order before trial, the Court observed that the resulting inventory form (exhibit P.E.3) could not be proved against the appellant because he

was not given the opportunity to be heard by the Primary Court Magistrate who ordered disposal, no photographs of the perishable Government trophies were taken as directed by the PGO.

Similarly, in the present case, the position which this court is at consensus with the learned State Attorney, that exhibit P4 that was tendered by PW3 the inventory form was procured in contravention of the law as such it was not supposed to be proved against the appellant who did not take part in the process of its preparation.

I also agree with Mr. Enosh Kigoryo, the learned State Attorney that in relation to the first count, the appellant was charged with and convicted on a non-existent offence, because section 21(1) (a) (2) of the NPA does not create the offence of unlawful entry into a game reserve. The defect that is not one of those defects that can be cured by section 388 of the Criminal Procedure Act. The section 21 (1) (a) and (2) section 29 (1) of the National Parks Act provides inter alia;

*'21.-(1) Any person who commits an offence under this Act shall, on conviction, if no other penalty is specified, be liable*

*(a) in the case of an individual, to a fine not exceeding five hundred thousand shillings or to imprisonment for a term not exceeding one years or to both that fine and imprisonment;*

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

*29.-(1) Any person who commits an offence against this Act is on conviction, if no other penalty is specified herein, liable to*

*a fine not exceeding ten thousand shillings or to imprisonment for a term not 18 exceeding one year or to both.'*

In the case of Willy Kitinyi cited by the State Attorney, this position was discussed, and the Court of Appeal referring what they decided in the case of **Dogo Marwa @ Sigana vs Republic, Criminal Appeal No. 512 of 2019** (unreported) admitted to have faced a similar situation and resolved that, the amendment brought under Act No. 11 of 2003 deleted the actus reus (illegal entry or illegal remaining in a national park) and held that;

*'We hold that the defect denied the appellant a fair hearing because he could not prepare an informed defence against a non-existent offence.'*

The discussion above suffices to dispose of the first count. On the second count which alleged that the appellant was found in possession of weapons within the National Park, I agree with Mr. Kigoryo's argument again that no evidence showing that the place the applicant was found was a reserve area and that as per **Willy Kitinyi's** Case (Supra) the prosecution had duty to establish that the appellant was actually found on the game reserve, as such the rest of the counts had no limb to stand on.

This leaves the third and fourth counts muted and incapable of being proved. Unless the prosecution produced in court the pieces of meat alleged to have been of zebra, two dry skin one of zebra and that of Impala, they could not prove the offence under that count. However, to avoid the meat and the skins from decaying, an order was made by a Magistrate to destroy it and an Inventory Form was signed.

It is the preparation of the inventory that is doubtful. The State Attorney, referring to the case of **Mohamed Juma @ Mpakama** (unreported), has submitted that the appellant did not participate in the process of ordering destruction of the meat so he was denied a hearing. Nowhere the appellant signed that inventory. Clearly, the procedure was violated. In the case of **Mohamed Juma** (supra) it was observed that while the police investigator was fully entitled to seek the disposal order from the Primary Court Magistrate, the resulting inventory form could not be proved against the appellant as he was denied the opportunity to be heard by the Primary Court Magistrate and no photographs of the perishable Government trophies were taken as directed by the PGO.

The same fortune happens to the present case in that the inventory form (exhibit P4) could not be proved against the appellant who did not take part in the process of its preparation. Since the foundation of the third and fourth counts flops, so does the charges against the appellant.

The case against the appellant was not proved beyond reasonable doubts, consequently the conviction and sentence of the trial court is quashed. The appellant be set free unless held for some other lawful cause.

THE HIGH COURT OF TANZANIA

**V.M. Nongwa**
**Judge**
**3/10/2022**