IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MUSOMA SUB REGISTRY

AT MUSOMA

CRIMINAL APPEAL NO 143 OF 2021

(Arising from Criminal case No 45 of 2020 of Serengeti District Court at Mugumu)

PAUL S/O MWIKWABE @ MWITA .....APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

16th August & 23rd September, 2022

F. H. Mahimbali, J.

The appellant Pual Mwikwabe @ Mwita together with his fellow Magige S/O John Magige (not party to this appeal) were together charged before the District Court of Serengeti with three offences namely unlawful entry into the National Park being in unlawful possession of weapons within the National Park and unlawful possession of Government Trophies. All these are offences contrary to section 21 (1) (a) (2) and section 29 (1) of the National Parks Act for the first count, section 24 (1) b and (2) of the National Parks Act for the second

offence, and contrary to section 86 (1) and (2) (b) of the Wildlife Conservation act, Act No 5 of 2009 read together with paragraph 14 of the First scheduled to, and section 57 (1) and 60 (2) of the Economic and organized crime control Act, Cap 200 R. E. 2019 for the third offence. The duo pleaded not guilty to the charge.

Essentially, it is the prosecution's evidence that on 27th day of June, 2020 at Darajambili area alleged to be into Serengeti National Park, which is within Serengeti District in Mara Region, the appellant and his fellow (not party to this appeal) were arrested by PW1 and PW2 for being unlawfully within Serengeti National Park. During their arrest, they were found being in unlawful possession of knife, spear and trapping alleged to be hunting weapons. Furthermore, they saw them in possession of one fresh head of Zebra and two fresh pieces of Zebra meat. Upon interrogating them none had permit authorising them to be within the National Park, possession of the said weapons and the said trophies. As to this, the three offences were dully preferred.

The said weapons upon seized (PE1), were admitted as PE2 exhibit. The alleged trophies, were admitted as PE3 exhibit as tendered by PW3 (Game warden). As they were perishable goods and hard in

preserving them, they were presented before Resident Magistrate of Serengeti by PW4 for disposal order whereby inventory proceedings were done in the presence and involvements of the appellant and his fellow accused where by one Gerene – Resident Magistrate, issued disposed order (exhibit PE4).

The appellant and his fellow disputed the claims contending that when they were arrested they had no any alleged trophy and that they were not within the National Park.

Upon hearing of the case, the trial Magistrate was fully satisfied that the charged offences were established beyond reasonable doubt relying on the evidence by PW1, PE2, PW3 and PW4 but discrediting the defense testimony. They were thus convicted and dully sentenced. In the first and second counts each was sentenced two years imprisonment. In the third count, each was sentenced to 20 years custodial sentence.

Not amused with the said conviction and sentence, the appellant has preferred this appeal armed up with a total of five grounds of appeal in which they can all boil into one main ground of appeal that there was no sufficient evidence by the prosecution to warrant conviction. On the

basis of these grounds of appeal, The appellant is praying that conviction and sentences meted out by the trial court be quashed and set aside.

During the hearing of the appeal, the appellant fended for himself who just prayed his grounds of appeal be adopted by the court to form part of his submission.

On the other hand, Ms Monica Hokororo learned senior state attorney, represented the Republic.

She first challenged conviction and sentences in respect of the first two offences as being wrongly convicted and sentenced with.

With the first offence, she submitted that, reading the charging section, there is no known offence created by section 21 (1) and (2) and section 29 of the National Parks Act, Cap R. E. 2019.

However, on the second count, she contended that the trial magistrate misdirected herself in convicting the appellant on the offence of being unlawful possession within the National Park which is an offence contrary to section 24 (1) and (2) b of the National Park. She argued that, for that offence to stand, there ought to have been clear evidence by map or statutory boundaries that at the point of arrest, the

appellant was within the geographical boundaries of Serengeti National Park statutorily established. As there was none of the evidence from the prosecution arresting witnesses (PW1 and PW2), one can hardly get convinced that at the alleged point of arrest, the appellant was actually within Serengeti National Park. She relied on her position by citing the case of **Mosi Chacha Iranga and Another vs Republic,** Criminal Appeal No 508 of 2019, CAT at Musoma.

Resisting the appeal on the third count which is the central offence classifying the charge as economic case with stiff penalty, Ms Monica was of the firm view that the available evidence can hardly challenge conviction meted out. She boldly submitted that as per testimony of PW1 and PW2 and PW3, the appellant was properly arrested, seized with the said trophies. The same was well identified by PW3, valued it and later inventory proceedings proceeded (PE4 exhibit).

The argument that the appellant was denied with the right to be heard (3rd ground of appeal), the typed proceedings of the trial court (page 36), She considered it as being baseless relying on what transpired on 13th July, 2021 (at page 35 of the typed proceedings) and 27th July, 2021 (at page 38 of the typed proceedings). In essence the

appellant gave his testimony as DW2 and freely closed his case (at page 36 of the typed proceedings).

Lastly Ms Monica – SSA, submitted that the prosecution's case was well proved beyond reasonable doubt. She thus prayed that the appeal be dismissed in its entirety for being devoid of any merit.

I have thoroughly digested and explained the appellant's grounds of appeal and submission by Ms. Monica. I have further traversed the proceedings at the trial court and the evidence as summarized above, I am first in agreement with Ms. Monica Hokororo learned state attorney that the first and second counts of the charged offences fell short of range.

First, there is no offence as per law pursuant to section 21 (1) a and (2) and section 29 (1) and (2) of the National Park Act, Cap R. E. 2019. What is provided in the said section is not an offence but punishment for the said alleged offence. Since punishment is not an offence but reward for the alleged committed offence it cannot form basis of conviction. In this case, the Prosecution wrongly charged the appellant. For clarity, the said section reads:

Section 21

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

a) ...

b) ...

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

Section 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 exceeding one year or to both.

On the second count, the charged offence of unlawful possession of weapons within the National Park, I also agree that it could only stand upon there was full proof that at the point of their arrest, was within the statutory boundaries of the established Serengeti National Park. That said conviction and sentence imposed in respect of the 1st and 2nd counts of the charge sheet are hereby quashed and set aside for being wrongly entered (see decision in **Mosi Chacha Iranga and Another vs Republic,** Criminal Appeal No 508 of 2019, CAT at Musoma).

As regards to the third offence the vital concern is whether the offence has been fully established beyond reasonable doubt that the

appellant was found in unlawful possession of the government Trophy to wit. a fresh head of Zebra and two fresh pieces of Zebra meat.

I have assessed the evidence of PW1 and PW2 (arresting officers), as per typed proceedings in pages 12-16. None mentions exactly between the appellant and the fellow accused person who held what. It is a very general evidence. Perhaps it is a suggestion that both were holding in hammock. However, no such evidence.

Secondly, the PW3 being game warden wants us believe that what he identified and valued is nothing but Zebra meat/animal. Why is it Zebra as per wildlife features, he described: *"head of Zebra has no horns, with black to white lines nose area has black in colour"* the two pieces of fresh meat are of Zebra because have *"yellow colour, meat fibre"*. What I know of wildlife, it refers to undomesticated animal species and all organisms that grow or live wild in an area without being introduced by humans. They normally have peculiar features from domesticated animals.

My question has always been this, are these description features unique that no domesticated animals bear them? I had expected there to be a clear scientific proof that such "hairs", "colour" or such type of

"meat fibre" describes nothing but such an animal. A mere saying that a "horn less head", "whitish and black colour" or "mere fibre meat" in my view cannot be said to be a scientific explanation of generic zebra. PW3 or the prosecution was expected to say more for it not to be mistakenly referred as domestic "donkey meat" or "dog".

In my considered view, the description of PW3 in respect of PE3 and PE4 exhibit to be nothing but Zebra meat fell short of sufficient scientific description.

Yes, it is trite law that every witness is entitled to credence and must be believed and his testimony accepted, unless there are good reasons for not believing a witness **(Goodluck Kyando vs Republic** [2006] TLR 363. However, for the witness to be given credence, what he testifies itself must be credible. The simple question now here is, what is credence in this evidence. That "a hornless head" belongs to Zebra or that it is whitish to black colour. That cannot be accepted legally to establish that it is a sufficient scientific explanation from an expert wild life officer.

That said and done I find this appeal meritorious. For want of sufficient proof/establishment of the scientific explanation of the alleged

meat to be government trophy, the appeal is allowed. Conviction is quashed and the sentence set aside. The appellant is thus ordered to be set free unless lawfully held by other causes.

It is so ordered accordingly.

DATED at MUSOMA this 23rd day of September, 2022.

F. H. Mahimbali

JUDGE

Court: Judgment delivered this 23rd day of September, 2022 in the presence of the appellant, Monica Hokororo state attorney for the respondent and Mr. Gidion Mugoa – RMA

Right to appeal to any aggrieved party is explained.

F. H. Mahimbali

JUDGE