**IN THE HIGH COURT OF TANZANIA**

**DISTRICT REGISTRY OF SHINYANGA**

**AT SHINYANGA**

**CRIMINAL APPEAL NO. 04 OF 2022**

*(Originating from Economic Appeal Case 36/2020 from Bariadi District Court)*

**MAIGE s/o MASUNGA@ BUTIZU.....APPELLANT**

*VERSUS*

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

*28th Sept & 7th Oct, 2022*

**V. M. Nongwa, J.**

The appellant named above was arraigned before the district court of Bariadi facing four charges, one for unlawfully entry in the National Park contrary to section 21(1)(2)(a) of the National Park Act Cap 282 R.E 2002 as amended by Act no. 11 of 2003, one count of unlawful Possession of weapons with intent to commit an offence contrary to Section 103 the Wildlife Conservation Act No. 05 of 2009, two counts of Unlawful possession of government trophies contrary to Section 86 (1) (2) (c)(iii) of the Wildlife Conservation Act No. 05 of 2009 as amended by Act No.2 of 2016 read together with paragraph 14 of the first schedule to and sections 57 (1) and section 60 (2) of the Economic and Organized Crime Control Act, [ Cap. 200 R.E 2019].

The particulars in brief are that on 27th day of July, 2020 at Mlima Duma area, in Serengeti National Park, within Bariadi District in Simiyu Region, was found in possession of one knife, one Panga and six animal

trapping wires in circumstances which raise a reasonable presumption that he has used or intends or is about to use the same for the purpose of commission of an offence. That he was also found in possession of one dray skin of Impara of equivalent to one Impala Unlawful killed valued at USD 390 equivalent to TZS. 906,750/= and six pieces of dry meat of Wildebeest equvalent to one Wildebeest unlawful killed valued at USD 650 equivalent to TZS. 1,511,250/= all the properties of Tanzania Government without a valid written permit from the Authority.

The appellant was found guilty, convicted and sentenced to pay fine of 200,000/ or serve 2 years in jail for the first and second count, while for the 3rd and 4th count, the appellant was to serve 20 years term of imprisonment in jail. The sentence was to run concurrently. Aggrieved by the conviction and sentence, he appealed before this court on the grounds that I wish to reproduce them as they are:-

'*1. That, the learned Magistrate erred in law and in fact by failure to consider my defense that they arrested me while I was cutting the bush.*

2. *That, the evidence adduced by the prosecution side was not to the standard required by the law thus left the shadow of doubts that I committed the said offence.*

3. *That, the trial magistrate erred in law and in fact when he failed to consider that the prosecution side failed to prove their case beyond reasonable doubts.*

4. *That, the trial court erred in law to hold conviction on weak evidence of the public witnesses thus create doubts and left a shadow of doubts that case was proved.'*

When the appeal was placed for hearing before me, the appellant appeared in person, unrepresented. He prayed for the court to consider his appeal as filed and he be left at liberty.

In her submission in opposing the appeal, Ms. Edith Tuka, the learned State Attorney submitted at once on 2nd, 3rd and 4th grounds as they are all on proof of the case beyond reasonable doubt. That the appellant was sentenced and convicted before Bariadi District Court for unlawful entry into National Park and being in unlawful possession and government trophies contrary Wildlife conservation Act. Prosecution arraigned four witnesses. PW1 and PW2, Park rangers who stated to have been on Patrol of Serengeti game reserve and upon arrival at Duma, met the appellant in that reserve, while there they found him with torch and trap wire, machete and a knife as clearly shown in the proceedings. That, they also found him with dry skin of Impala and Wildebeest dry meet. That upon interrogations he had no permit allowing him to be there, as such they seized his items and the trophies. The learned counsel said on those premises, the 1st offence was cleared.

Ms. Edith Tuka, went on submitting in opposing the appeal that, the appellant upon being arrested was handled to PW3 together with all other items Sgt Ame who had received from the investing officers, also PW4 came to police and inspected the exhibits and concluded about trophies to be Impara dry skin and wildebeest dry meat and gave the value of the trophies. From those witnesses' testimonies, seizure certificate and evaluation report together with the analysis of the trial court, the learned counsel insisted that the case was proved beyond reasonable doubts, as such the appellants appeal has no merit.

Submitting on the ground that the appellant defense was not considered, Ms. Edith Tuka argued that the trial court did analyze the defense in its reasoning as shown clearly in the copy of Judgement, although the defence was not able to shake the prosecution evidence. That, clearly, the courts findings based on both sides evidence, thus the case was proved, the appeal be dismissed.

I have considered the submission of Ms Edith Tuka, and the records of the lower court. First of all, the 1st Count named unlawful entry into the National Park, that offence does not exist on the ground that S. 21 (1) (a) and (2) it does not create an offence. This was has been stated in number of court decisions and is the position in 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.

Moreover, I have endeavored to go through the evidence of the Prosecution and found no evidence showing that the place the applicant was found is a reserve area, only PW1 and PW2 the Park ranger officer who claim to have been on patrol at Mlima Duma area around 19hours they saw torch light like and upon following they saw the appellant. Their evidence is not clear as to the boundaries of the game reserve, it is not clear as where the appellant was found was game reserve. As per **Willy Kitinyi's** Case (Supra) at page 11 last paragraph, the prosecution had a 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.

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 "P5", which was alleged to have been issued upon order for destroying the items. Nowhere the appellant is seen to have witnessed or signed the inventory and as per **Willy Kitinyi's** case (Supra) the said Exhibit "P5" 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.

This court is of the position that 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. 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, 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 solved that the amendment brought under Act No. 11 of 2003 deleted the actus reus (illegal entry or illegal remaining in a national park) and got confusion in section 21 (1) of the National Park Act 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 is 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, again that no evidence showing that the place the applicant was found is 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 muffled and incapable of being proved. A similar wave stamps the third count. In respect to this count, unless the prosecution produced in court the pieces of meat alleged to have been of Wildebeest and one dry six skin of Impala, they could not prove the offence under those 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. As in the case of **Mohamed Juma @ Mpakama** (unreported), 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 stated that;

> *'While the police investigator ...was fully entitled to seek the disposal order from the Primary Court Magistrate, 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. In addition; no photographs of the perishable Government trophies were taken as directed by the PGO. (Emphasis added)'*

The same fortune happens to the present case in that the inventory form (exhibit P5) 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 charge against the appellant.

The case against the appellant was not proved beyond reasonable doubts, this ground only surfices to dispose of the rest of the grounds of

appeal. Consequently, the conviction and sentence of the trial court is quashed. The appellant **MAIGE s/o MASUNGA@ BUTIZU** be set free unless held for some other lawful cause.

It is so ordered.

Dated and delivered at Shinyanga this 7th October, 2022 in presence of the parties.


**V.M. Nongwa,**
**Judge.**
**7/10/2022**