IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF MUSOMA

AT MUSOMA

CRIMINAL APPEAL NO. 58 OF 2021

(Arising from Economic Case No. 62 of 2017 in the District Court of Serengeti at Mugumu)

MWITA MWITA @ CHACHA..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

4th February and 21st February, 2022

F. H. MAHIMBALI, J.:

Mwita Mwita @ Chacha, the appellant was charged and convicted by the District Court of Serengeti at Mugumu of three counts namely, unlawful entry into the national park; unlawful possession of weapons in the National Park and unlawful possession of government trophy. In consequence, the trial court sentenced him to serve two years, two years and twenty years jail term for the 1st, 2nd and 3rd counts respectively.

It was adduced in the charge sheet that, on 27/5/2017 at about 22.00 hours at Korongo la Hingira area in Serengeti National Park the appellant was found in the National Park without permit and when

searched he was found in unlawful possession of weapons to wit; one panga, one spear, and two animal trapping wires. It was further alleged that the appellant was found in unlawful possession of government trophy to wit; one piece of dried Hippopotamus valued at Tshs. 3,270,000/= the property of Tanzania Government.

The appellant denied the charges levelled against him. In proving the charges, the prosecution called three witnesses and tendered two exhibits. The witnesses were two park rangers (PW1 and PW2) who arrested the appellant and PW3 who is a wildlife warden who valued and identified the government trophy. The prosecution evidence was to the effect that; On 27/05/2017 at about 22.00 hours PW1, PW2 (park rangers), William Anyakwise , Modest Kaigaze and Epathra Timo were on patrol at Korongo la Hingara within Serengeti National Park. They saw light from the bush. They went closer and found the appellant and the light was from a torch. They searched him after he introduced himself and found him in unlawful possession of weapons to wit; one panga, one spear, and two animal trapping wires. He was also found in unlawful possession of government trophy to wit; one dried piece of meat of Hippopotamus. They took him together with the exhibits to Mugumu police station and police case no. MUG/IR/1931/2017 was opened. They labelled the weapons which were later tendered in court

as exhibits P.E.2 collectively.

At the police station DC Nelson called PW3 to identify the government trophy. PW3 testified that he identified the dried piece of hippopotamus meat using its grey color and slightly black and it had red- viscous fluid colour. He also valued it at tshs. 3,270,000/=. He tendered the trophy valuation certificate which was admitted as exhibit P.E.3. That was the end of the prosecution case. The court found the appellant with a case to answer and he was given his right to defend himself. He elected to fend for himself and under oath.

He testified that he recalls on 26/5/2017 at around 10:00 hours he was at Merenga a mining area. They were conducting mining activities until the night of 27/5/2017 when two people were killed in the mines. They were ordered by the District Commissioner of Serengeti to stop the mining activities. They left and he met with his colleague known as Wawangi Mkukumbo. They went to an area known as Korongo, it was the border between Merenga and Machochwe village. A motor vehicle appeared and they stopped it. They entered the vehicle. Surprisingly, they were taken to Matoro Camp instead of Machochwe village. When they asked them why they did not stop at Machochwe village, they were told they had unlawfully entered the national park. They were then taken to Mugumu Police station and later brought before the court.

After a hearing of the prosecution and the defense case, the trial court was satisfied that the prosecution had proved its case beyond reasonable doubt and consequently convicted and sentenced the appellant as stated herein. The decision did not amuse the appellant. He has come to this court to challenge the trial court's decision through his petition of appeal that is armed with five grounds of appeal. The grounds of appeal in verbatim are as herein under;

1. *That, the trial magistrate erred in law and fact to convict and sentence the appellant by relying on shack and weak evidence of prosecution side which was obviously incredible in nature which lead him to make injustice judgment towards the appellant.*
2. *That, the extraction of exhibit P1 was not witnessed by appellant and endorsed by the police officer under local jurisdiction to justify authorization towards disposal of decaying exhibit P1 as per the terms of the economic and organized crime control Act.*
3. *That, the trial court erred in law and fact for convicting and sentencing the appellant by relying exhibit PE3 and evidence of PW3 which was tendered by an expert from Government chemist it is impossible to identify the meat of animal by using colors only it needs further expertise.*
4. *That, the trial magistrate erred in law and fact by directly believing on poor and irrelevant evidence narrated by the prosecution side. The said circumstantial evidence by*

examining carefully such prosecution evidence has a lot of doubt which was unsafe to rely upon and pass conviction and sentence against the appellant.

5. *That, the trial magistrate erred in law and fact to pass conviction and sentence towards the appellant when he failed to consider the defense adduced by the appellant during the defense hence, he ended up by making a sample of reference to it.*

When this matter came up for hearing, the appellant appeared in person and was unrepresented while the respondent enjoyed the legal services of Mr. Malekea, state attorney. The matter was heard by way of audio tele conference.

Submitting in support of his appeal, the appellant prayed his grounds of appeal to be adopted to form part of his appeal and he further stated that this case was fabricated against him, he prayed he be acquitted.

Submitting in rebuttal, on the first ground, Mr. Malekela stated that with the first ground of appeal, the prosecution evidence was not weak and insufficient as argued. This is because the court's proceedings are clear that the appellant was arrested while on his way back from the mining centers. Though it was night time, it was his submission that there are good reasons to implicate the appellant with the charge because he was arrested within the perimeters of Serengeti National

Park. Hence the prosecution's evidence was credible and trustable.

Regarding the second ground of appeal, he stated that he does not see in the proceedings (page 16) where exhibit P1 was admitted but only PE2 and PE3exhibits. According to the proceedings PE1 is not known what is it and how it was admitted. He therefore conceded to the second ground of appeal on the admissibility of PE1.

On the third ground, he succumbed that exhibit PE3 in its essence is on the value of the trophy and not proof of the trophy. According to section 101 (1) of the Wildlife Conservation Act, the trophy (Hippopotamus) ought to have been valued. He further submitted that there was no relationship between government chemist and government valuer. It was his submission that the two are different experts each responsible in his specific area of expertise.

On the fourth ground, he reiterated his submission on the first ground as it is replica to what is argued in ground one of the petition of appeal.

Lastly on the fifth ground of appeal, he stated that the defense testimony was well considered and it is evident on page 6 of the typed judgment save that it was short of range and that it didn't raise reasonable doubt as per law.

However as regards the first count, he submitted that it was his

observation that the first count is not an offence as per the law.

Regarding the second count of unlawful possession of weapons in the National Park, he stated that he is not sure whether the appellant was arrested within the borders of Serengeti National Park. He stated so because none of the prosecution witnesses described the clear boundaries of Serengeti National Park. He left it to the court to determine this issue.

Rejoining, the appellant had no more to add, he left it to the court to do justice.

After hearing the submissions of the parties and going through the records, this court will now determine if this appeal has merits.

The appellant's first complaint is that the prosecution evidence is weak and insufficient. The respondent vehemently contested this ground. It was the prosecution's evidence that on 27/5/2017 at about 2200 hours at Korongo la Hingira area in Serengeti National Park, the park rangers found the appellant in Serengeti National Park with weapons and government trophy without any permit. From this evidence it is clear it was at night and they arrested him together with the weapons and the alleged trophy. When the exhibits were being tendered, he never denied to their admission. I will discuss the relevancy of this later when considering the substance of the whole

appeal and its final verdict.

In considering the second grief, the appellant stated that he was not present when exhibit PE1 was being extracted. The respondent stated that exhibit PE1 was not admitted however he conceded to this ground. It is my finding that this ground of appeal is meritorious as it is not known what PE1 exhibit is and how it was admitted.

The third grief of the appellant is that the trial court erred as it relied on exhibit PE3 and evidence of PW3 which was tendered by a government chemist and it needed further expertise. The respondent on the other hand contested this ground by stating that the essence of exhibit PE3 is to determine the value of the trophy and according to section 101(1) of the Wildlife Conservation Act, the trophy must be valued. From the court's record it is evident that exhibit PE3 is the trophy valuation certificate and the appellant did not object to its admission. Regarding the issue that a government chemist tendered PE3 is not correct as the form was filed by a wildlife warden and it was also tendered by the same wildlife warden without any objection which according to section 3 (c) and 114 (3) of the Wildlife Conservation Act, Act no. 5 of 2009 is the competent person to evaluate and tender it. That said, this ground is dismissed as it lacks merits.

The appellant's fourth grief is that the prosecution evidence has a

lot of doubts. The respondent reiterated his submission as argued in the first ground.

In this case the appellant was charged with three counts and this court will go through the trial proceedings to see if all the three counts were proved beyond reasonable doubts.

In my digest to the whole case's proceedings and evidence, I have the following to comment as far as this appeal is concerned. On the first count the appellant was charged with the offence of unlawful entry into the National Park contrary to sections 21(1)(a) and (2) and 29(1) of the National Parks Act Cap.282 [R.E.2002] as amended by Act No. 11/2003. For easy of reference I will produce section 21(1)(a) of the National Parks Act (supra) herein under;

> *21.-(1) Any person who commits an offence under this Act shall, on conviction, if no other penalty is specified, be liable - Act No.11 of 2003 (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.*

This court holds that the section the appellant was charged with in regards to the first count does not establish the offence of unlawful entry into the national park but only punishment for it. Therefore, the

first count was wrongly charged as the relevant section does not create the offence.

On the second count of unlawful possession of weapons in the National Park, the prosecution stated that they found the appellant with one machete, one spear and two animal trapping wires in the national park. They arrested him together with the weapons and took him to the police station. Then, the weapons were taken to court whereby they were admitted as exhibits. The prosecution did not state who stored the weapons at the police station until they were taken to the court and if they were the same weapons. That said, it is the view of this court that the second count was not proved beyond reasonable doubt.

The appellant was also charged with the offense of unlawful possession of government trophy in the national park. To be specific he was found in possession of one piece of dried meat of Hippopotamus the property of Tanzania government. However, the procedure of destroying the trophy was not complied with. The appellant was supposed to be present during the hearing of filing the inventory. I have gone through the court's record and I do not see the inventory form. Therefore it is safe to state that the appellant was not heard as per paragraph 25 of the Police General Orders. This provision requires,

among others, the accused person to be presented before the magistrate who may issue the disposal order of exhibit which cannot easily be preserved until the case is heard. It provides: -

> *"Perishable exhibits which cannot easily be preserved until the case is heard, shall be brought before the Magistrate, together with the prisoner if any so that the Magistrate may note the exhibits and order immediate disposal. Where possible, such exhibits should be photographed before disposal."*

The law is settled the accused must be heard as well. See **Mohamed Juma @ Mpakama vs R,** Criminal Appeal no. 385 of 2017, CAT (unreported), where it was held that: -

> *"While the police investigator, Detective Corporal Saimon (PW4), 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.*** (Emphasize supplied).

Having stated the above, it is safe to state that the third count was not proved beyond reasonable doubt.

Therefore, it is safe to hold that all the three counts were not proved beyond reasonable doubt.

Lastly, the appellant complained that his defense was not considered. I have gone through the court's record at page 6 of the typed judgment it is evident that the defense evidence was considered. When the trial magistrate stated that the defense of the accused person did not raise any doubt against the prosecution evidence as he did not bring the other person he was with when they were in a lift with him when they were returning from Merenga a small mining area.

All said and done, this court holds that since all the three counts were not proved beyond reasonable doubt, this appeal is allowed and the trial's court proceedings and conviction are quashed and the sentences are set aside.

This court orders the immediate release of the appellant from custody unless he is lawfully held for another course.

It is so ordered.

DATED at MUSOMA this 21st day of February, 2022.

F.H. Mahimbali

Judge

21/02/2022

Court: Judgment delivered this 21st day of February, 2022 in the presence of the Appellant, Mr. Frank Nchanila, State Attorney for the respondent and Mr. Gidion Mugoa – RMA

Right of Appeal is explained.

F.H. Mahimbali

Judge

21/02/2022