IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MUSOMA SUB REGISTRY

AT MUSOMA

CRIMINAL APPEAL NO. 49 OF 2021

(Arising from economic case no. 160 of 2019 in the district court of Serengeti at Mugumu)

NIRA SAGUDA @ KABADI.....APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

4th February and 28th February, 2022

F.H. MAHIMBALI, J.:

The appellant, Nira Saguda @ Kabadi together with two others (not parties of this appeal) were arraigned at Serengeti district court with three counts namely; unlawful entry into the National Park , unlawful possession of weapons in the National Park and unlawful possession of government trophies. They were heard and as the end result, they were convicted and sentenced to serve one year imprisonment, one year imprisonment and two years imprisonment for the 1st, 2nd and 3rd counts respectively.

It was adduced in the charge sheet that on 23/12/2019 at Warajoro area into Serengeti National Park , the appellant together with

the other accused persons did enter into the National Park without permit and they were found in unlawful possession of weapons to wit; two panga, one knife and two spears. They were also found in unlawful possession of government trophy to wit; two hind limbs fresh meat of wildebeest, properties of the United Republic of Tanzania.

The appellant denied the charges levelled against him. In the process of proving their case, the prosecution paraded four witnesses and five exhibits which were tendered and admitted in court as evidence.

The background facts leading to this appeal are as follows; On the 23/12/2019 at 16:00 hours , the park rangers (PW1 and PW2) together with Dotto Mwita were on patrol at Warajoro area into Serengeti National Park. They saw three people with a motorcycle. They followed them and then fled leaving behind the motorcycle. They were able to arrest the appellant and one other. The third person tried again to escape and he disobeyed their order, they shot him on the left leg and he fell down. The park rangers found them in possession of two pangas, two spears, one knife, two fresh hind limbs of wildebeest and two motorcycles (SANLG red in colour and SANMOTO with registration number MC 101 AVS blue in colour). When they interrogated them if they had permit to be in the National Park and possess weapons and

government trophy, they said they had none. The park rangers filled the certificate of seizure, PW1 asked the court to tender it and it was admitted and marked as exhibit PE1 without any objection. They took the appellant and the other accused person to Mugumu police station and case MUG/IR/3796/2019 was opened. PW1 also identified the weapons he found the appellant with the other accused by stating that the panga had a black handle and the spear and the knife was covered with a black rubber. They weapons were also marked with the case file number. PW1 prayed they be tendered as exhibits in court and they were admitted and marked as exhibit PE2 collectively without any objection from the appellant and the other accused person. Further to that the two motorcycles were identified in court as they were also marked with the case file number. PW1 also prayed to tender them in court as exhibit and they were admitted and marked as exhibit PE3 and PE4. The appellant and the other accused person did not object to their admission.

On 24/12/2019 at 8:00 hours at Mugumu police station , G.3071 D/CPL Geniune (PW4) received a case file MUG/IR/3796/2019. He was with D/CPL Faraja. They saw the exhibits and the accused persons. On the same day at 9:00 hours he called Wilbrod Vicent (PW3) a park warden to identify and value the government trophies. PW4 took the

appellant and the other accused person with the government trophies to court. They signed the inventory form using their thumbs. At the court the magistrate ordered the trophies to be destroyed. PW4 prayed the inventory form to be admitted as evidence and it was admitted and marked as exhibit PE6 without any objection from the appellant and the other accused person. PW3 identified the government trophy through their slain slightly to dark brown colour. He also valued the trophy. One wildebeest is valued at 650 Usd equivalent to Tsh. 1,430,000/= PW3 filled the trophy valuation certificate. He prayed it be tendered in court. The trophy valuation certificate was admitted and marked as exhibit PE5 as the appellant and the other accused person did not object to its admission.

D/CPL Faraja interrogated the appellant and the other accused person and on 27/12/2019 they were then taken to court.

The court found the appellant and the other accused person with a case to answer and the appellant exercised his right by stating that he will give his evidence on oath and call two witnesses.

The appellant fended for himself by stating that on 23/12/2019 in the morning he went to graze a herd of cattle and he resides near the National Park. At 1400 hours he took the cattle to the river so that they could drink water and surprisingly a car belonging to TANAPA stopped

and two rangers came out of the car. They arrested him and took him to Mugumu police station. When he was crossed examined he stated that he was grazing together with Makaranga , the third accused person.

After hearing both sides the court convicted and sentenced the appellant and the other accused person as stated herein above. The trial court's decision aggrieved the appellant and he came to this court in search of his rights through his petition of appeal encompassed with four grounds of appeal. The grounds of appeal are summarized as follows;

1. *That, the trial magistrate erred in law and fact as he was not present when the magistrate was issuing a disposition order of the government trophy.*
2. *That, the trial magistrate erred in law and fact to convict and sentence the appellant as wrong exhibits were admitted in court.*
3. *That, the trial magistrate erred in law and fact as an independent witness was not called.*
4. *That, the trial magistrate erred in law and fact by admitting wrong evidence from PW2 and PW3.*

When this matter came for hearing , the appellant was present in person and unrepresented while the respondent enjoyed the legal services of Mr. Frank Nchanilla, learned State Attorney.

Submitting in support of his appeal the appellant asked the court to

adopt his grounds of appeal as part of his submission. He had nothing extra to add.

Mr. Nchanilla before submitting in rebuttal he first stated that the appellant had contravened the provisions of section 362(2) of Cap 20, as he has mixed both points of law and facts. It was his submission that the appeal is incompetent and should be struck out.

Responding to the first ground, the respondent states that as per PW4's evidence at page 36 of the typed proceedings , the appellant was involved during the destruction of the said trophy. He submitted further that the said exhibit (PE6) was admitted without any objection from the appellant on its admissibility and he also did not ask any questions in respect of that issue. It was his submission that the appellant was fully involved and that his ground is baseless.

Regarding the second ground of appeal , it was the respondent's submission that the PW1 testified clearly and all the exhibits were tendered and admitted in court without any objection. He went further to submit that exhibit PE1,PE2,PE3 and P4 were procured and tendered in court as per law. Hence the appellant was aware of what was going on.

On the third ground, the respondent submitted that the appellant was arrested within Serengeti National Park hence there was no need of

an independent witness to be called by the prosecution. He further submitted that the appellant was given an opportunity to call his witnesses.

Apart from the above submissions, Mr. Nchanila regarding the legality and proprietness of the charged offences, made the following submission. With the first count of unlawful entry into the National Park, he stated that the cited provision of the law does not create the offence. Hence, the appellant was not properly charged as per the law. The conviction and sentence thereof are nullity. He prayed that the appellant be acquitted from the first offence.

As regards to the second count of unlawful possession of weapons within the national park, Mr. Nchanilla stated that in order to establish this offence , the prosecution had to provide whether the point of their arrest was within the Serengeti National Park. Unfortunately, there were no statutory boundaries described that the said area of their arrest was in Serengeti National Park. He thus faulted conviction on the second count as well.

Regarding the third count of unlawful possession of government trophy, he submitted that whether the alleged trophy belongs to wildebeest or not, according to section 114(3) of the Wildlife Conservation Act, it is primafacie that what was arrested was

government trophy. The fact that PW3 is an expert witness, the law requires he must be given credence as per section 114(3) of the Wildlife Conservation Act.

After hearing the parties' submissions and going through the court's record, this court will now determine if this appeal has merits.

This court will first determine the ground raised in the petition of appeal and then revert to the issues raised by the respondent.

The first moan of the appellant is that he was not present before the magistrate when the order for destruction of the government trophy was being issued. The respondent contested by stating that since there was no objection in its admission and the appellant never asked question on exhibit PE6 then he was fully involved. I have gone through exhibit PE6 , which is the inventory form and the appellant's thumbprint is on the exhibit and at the back of the exhibit there are court's proceedings that were presided by Hon. Ginene, Resident Magistrate. The appellant admitted to have been found with the government trophy in those proceedings, this suffice to state that a hearing was conducted 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).

Gathering from the above , the first ground of appeal lacks merits and it is dismissed.

Regarding the second grief of the appellant, he stated that the trial court admitted wrong exhibits in court. The respondent , vehemently contested this ground. This court is at one with the respondent that the appellant has not given any reasonable explanation why the exhibits were wrong. It is this court's view that all the exhibits

admitted were properly admitted and were tendered by the proper party. That said, this ground lacks merits.

The appellant in his third ground lamented that independent witnesses were not called. According to the court's record the incident occurred in the allegedly National Park and he was arrested by park rangers. It is a settled law that an independent witness is required when an appellant is arrested in a dwelling house. In the case at hand the appellant was not in a dwelling house and the witnesses who arrested him were competent as per section 127 and 61 of the Tanzania Evidence Act, cap 6 R.E. 2019. Therefore, it is my humble view that this ground is also devoid of merits and it is dismissed.

The appellant's fourth complaint is that the trial court admitted the wrong evidence of PW2 and PW3. I have gone through the court's record and I don't see the rebuttal submission of the respondent on this issue. However, as per court's record , it this court's holding that the appellant has not established why PW2 and PW3's evidence were wrong. The trial court according to the record found them to be credible witnesses and accepted their testimonies. Normally the appellate court does not interfere with that finding unless there are cogent reasons to do so. This is because every witness must be given credence to what he

is testifying in court. However in the current matter, PW2 is the arresting officer whereas PW3 is certifying officer who certified that the said fresh meat arrested with the appellant is government trophy of wildebeest animal. Why is the alleged government trophy belonging to wildebeest, PW3 stated that because the said meat had features of "slightly grey-dark brown" I am of the considered view, this description though issued by an *exparte* witness is wanting of clearer scientific explanations that what is alleged to be government trophy by those features is really one. The central question now is, are those features "slightly grey-dark brown" not belonging to no one else save wild animal by name of wildebeest? Can it not be of a monkey, dog or any other known animal wild or domestic animal? The scientific explanations by PW3 are short of description for this court to get satisfied without any scintilla of doubt that it was only wildebeest's meat. How is that description of the called features of wildebeest differentiated from others. By colour only? On that doubt, I give benefit to the accused person. On this consideration, 3rd count collapses for want of establishment.

Finally on the issue raised by the respondent's attorney, Mr. Nchanilla that the appellant has mixed points of law and facts in his petition of appeal, hence contravening section 362(2) of Cap. 20, and he

therefore prayed that the appeal to be struck out. Yes, section 362(2) is coached on mandatory terms, that means it must be complied with. However, it was expected the same to be addressed as preliminary objection. Considering it now, it sounds more legal than justice of the case as per circumstances of this case.

However, this court is at one with the learned state attorney that on the first count that the offence was not proved beyond reasonable doubt. This is because the cited provision does not create an offence. Further to that, this court also holds that the second count was not proved and this is due to the fact that their point of arrest was not statutorily established to be within the boundaries of Serengeti National Park.

All said and done, it is the finding of this court that the appeal is allowed, conviction quashed, sentence set aside. The appellant is hereby ordered to be released forthwith unless lawfully held by other causes.

It is so ordered.

DATED at MUSOMA this 28th day of February, 2022.

F. H. Mahimbali

Judge

28/02/2022

Court: Judgment delivered this 28th day of February, 2022 in presence of the appellant, Mr. Frank Nchanila state attorney for the respondent and Mr. Gidion Mugoa – RMA.

Right to appeal is explained.

F.H. Mahimbali

Judge

28/02/2022