**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**THE DISTRICT REGISTRY OF BUKOBA**

**AT BUKOBA**

**ECONOMIC APPEAL NO. 05 OF 2021**

*(Originating from Economic Case No. 27 of 2019 of the District Court of Biharamulo at Biharamulo)*

**EMMANUEL DAMIAN----------APPLICANT**

**VERSUS**

**REPUBLIC ---------- RESPONDENT**

# JUDGMENT

**Date of Last Order: 09.03.2022**

**Date of Judgment: 18.03.2022**

**Hon. A.E. Mwipopo, J.**

Emmanuel Damian, the Applicant herein, filed the present appeal against the decision of Biharamulo District Court in Economic Case No. 05 of 2019. The Appellant was charged with six counts of unlawful entry into a National Park, unlawful possession of Government Trophies and unlawful possession of weapons in the National Park. The offences were committed on 26th October, 2019 at Burigi-Chato National Park within Biharamulo District in Kagera Region. The appellant

was charged in the first count for the offence of unlawful entry into a National Park contrary to section 21(1) (a) of the National Park Act, Cap. 282 of the Laws. In the 2nd to 5th counts he was charged for the offences of unlawful possession of government trophies contrary to section 86(1) and (2) (c) (ii) of the Wildlife Conservation Act, read together with paragraph 14 of the 1st Schedule to and section 57(1) of the Economic and Organized Crimes Control Act, Cap. 200 R.E. 2002. In the 6th count (last count) he was charged for unlawful possession of weapon in a National Park contrary to section 24 (1) (a) (b), (2) and 29 (2) of the National Park Act, Cap. 282, R.E. 2002.

The appellant was aggrieved by the decision of the District Court and he filed a petition of appeal containing a total of 4 grounds of appeal. The grounds of appeal filled by the Appellants were as follows:-

1. *That, the record (proceedings) has not stated whether the prosecution has established prima facie case.*
2. *That, the Hon. trial Court grossly erred in law and facts to convict the appellant while the prosecution failed to prove the case on the standard required by the law which is beyond reasonable doubt.*
3. *That, Hon. trial Court failed to observe that the whole prosecution witnesses were not credible as they contradicted themselves on evidences adduced before the Court and it was just a pack of lies against the appellant.*
4. *That, Hon. Magistrate erred in law and facts to convict the appellant relying on the certificate of seizure which was wrongly admitted as Exhibit.*

The appellant also filed additional petition of appeal on 08th September, 2021 which contain six grounds of appeal as follows:-

1. *That, the Hon. trial Court erred in law and facts to convict and sentence the appellant relying on insufficient evidence being influenced by public interest leading to prejudice and injustice to the appellant right and justice.*
2. *That, the Hon. trial Court fatally messed in law to convict and sentence the appellant disregarding and dismissing his defence evidence whereby the prosecution failed to adduce cogent evidence to prove that the appellant ever reached in the National Park's territory.*
3. *That, Hon trial Court was not fair and sided with the prosecution witnesses who adduced untrue evidence on the effect that the appellant would carry and transit a heavy luggage of five heads of reedbuck, four horns of impala, twenty legs of reedbuck, fifteen pieces of reedbuck meat, one head of oribi, six African hare meat, a knife and bush knife while on foot with no transport means or fire weapon was seized along with him.*
4. *That, it is doubtful and unbelievable to state that the park ranger together with his fellow who claim to have arrested the appellant red handed with the said exhibit failed to take any video clip from their smart phones as proof if really appellant was found or caught within National Park.*
5. *That the appellant expounded the way he never signed certificate of seizure contrary to section 38 (3) of the Criminal Procedure Act, Cap. 20, R.E. 2002, cull this out as the prosecution had to adduce video clip evidence incriminating the appellant or to call civilian witness with no public interest.*
6. *That, the exhibit was tendered in Court before the appellant was brought to Court.*

The appellant who appeared in person submitted jointly on all grounds of appeal. He said that he did not sign the certificate of seizure which was tendered in Court and the exhibit of the case were tendered in court before he was brought to court. He said that if those exhibit were found in his possession, they would have been brought to court when he was arraigned in court. He prayed for the court to consider all of his grounds of appeal and allow this appeal.

In response, Mr. Amani Kirua, State Attorney appearing for the respondent supported the conviction by the trial court. He submitted on the first ground of appeal that the record shows in page 31 of typed proceedings the trial court did find the prosecution established the prima facie case, hence this ground has no merits.

On the second ground of appeal, the counsel for the respondent said that the prosecution proved the offence without doubt. The witnesses proved that the appellant was caught in the National Park with two other persons but his fellow culprit were able to escape. The appellant was caught with government trophies and weapons in the National Park hence the evidence proved without doubts that he committed the offence.

The Counsel submitted on the third ground of the appeal that the credibility of the witness is the domain of the trial court. The credibility of witness is assessed by conduct of the witness in court or by comparing to the testimony of other

witnesses and when cross examined. In this case there is nothing to show that the witnesses were not credible.

On the 4th ground of appeal, the counsel said that the evidence of PW1 and PW2 shows how the appellant was caught and the certificate of seizure was filed before he was taken to police and later on to the court.

The counsel thereafter responded to the appellant's additional ground of appeal. In the first additional ground of appeal he said that the trial court evaluated the evidence available in record and reached the proper decision. There is nothing which prejudiced the appellant. On the 2nd additional ground of appeal, he said that the prosecution evidence proved that the appellant was caught in the National Park with government trophies. The appellant never cross examined witnesses who testified that he was found in possession of Government trophies in the game reserve.

On the third additional ground of appeal, the counsel submitted that the prosecution evidence proved that the appellant was arrested with a knife and bushknife. The appellant never questioned on cross examined the witnesses on the important aspect of the case shows that the appellant has admitted the evidence. Thus, the ground has no merits. He added that the fourth additional ground of appeal also has no basis.

Then the counsel submitted on the fifth ground of appeal in the additional Petition of appeal. He said that there was no need to issue certificate of seizure where the person was caught with the trophies. Even recording the video is not mandatory.

On the last ground of appeal, the Counsel said that the appellant was present when the exhibit was brought in court and the inventory was issued, only that he did not sign the said inventory.

In his rejoinder, the appellant said that there is contradiction on the number of Certificate of Seizure which were filed in the case. It was submitted that the prosecution never called the Magistrate who filed the inventory to testify. It was not possible to kill all those animals by using knife and bushknife. The case had no investigator.

In this appeal, the main issue for determination is whether or not the appeal before this Court has merits.

Commencing with the first ground of the appeal, the appellant alleged that the record (proceedings) has not stated whether the prosecution has established prima facie case. I have perused the typed proceedings of the trial Court in page 31 show that on 19th October, 2020, the trial Court delivered a ruling that the prosecution has established a case to answer. Thus, this ground has no merits.

The appellant 3rd ground of appeal is that the prosecution witnesses were not credible as they contradicted themselves on evidences adduced before the Court and it was just a pack of lies against the appellant. Reading the evidence in record, it is true that PW1 testified that appellant was arrested at 05:00 hrs on 26th October, 2019. In re - examination the PW1 stated that the appellant was arrested around 23:00 hrs. Whereas, PW4 said that he was arrested at 17:00 on the same date. This raises doubt as to the time the appellant was arrested. PW1 mentioned two different time, which is on 05:00 hrs and 23:00 hrs. These time stated by PW1 are during night time where there is no sunlight, but the time stated by PW4 it was during a day time. I find that the contradiction is not minor. In the case of **Mohamed Said Matula v. Republic [1995] TLR page 3**, the Court of Appeal held that:

> *"where the testimony by witnesses contain inconsistencies and contradictions, the court has a duty to address the inconsistencies and try to resolve them where possible , else the court has to decide whether the inconsistencies and contradictions are only minor or whether they go to the root of the matter"*

The Court of Appeal in another case of **Said Ally Ismail v. Republic**, Criminal Appeal No. 249 of 2008 (unreported), categorically said;

> *"It is not every discrepancy in the prosecution case that will cause the prosecution case to flop. It is only where the gist of the evidence is contradictory then the prosecution case will be dismantled."*

From above two cited cases, the Court has duty to consider where there are inconsistences, and determine whether they are minor not affecting the prosecution case or they go to the root of the matter.

In **Mapambano Michael @ Mayanga V. Republic,** Criminal Appeal No. 268 Of 2015, Court of Appeal of Tanzania at Dodoma, (Unreported), the Court cited with approval its holding in **Munziru Amri Mujibu and Dionizi Rwehabura Kyakaylo vs. Republic**, Criminal Appeal No. 151 of 2012, (unreported), wherein the Court regarded contradictions in evidence so material to the integrity of the conviction of the appellant that it did not wish to engage other grounds of appeal. In the said case of **Munziru Amri Mujibu and Dionizi Rwehabura Kyakaylo vs. Republic**, (Supra), the Court held that:-

> *"...In the present case credibility of the witnesses was highly suspect. There were several contradictions in the testimonies of the witnesses. For example while the key witness (PW9) said that the bandits entered her shop at 07.45 pm and left at 11 pm another witness (PW11) testified that the whole incident took only 10 minutes. There was also a contradiction as to the 2nd appellant's attire between PW1 and PW9. PW9 said he was wearing a Kaunda suit while PW1 said he was wearing a long coat. PW9 gave evidence purportedly to show that she had ample time to identify the second appellant. She said that as between 12:00 noon and the time they were invaded the 2nd appellant had been in and out of her shop six times. We found it difficult to buy her story. Firstly, she did not record in her statement to the police that she had identified the appellant at the scene of crime. Secondly, it was inconceivable*

*that someone intending to commit such a serious crime as robbery would present himself to the victim several times as if to make sure that he is marked. As the witnesses were not credible, conviction ought not to have been sustained."*

In the case at hand, despite the presence of only one contradiction over the time of the arrest of the appellant in the National Park with the weapons and Government Trophies in the testimony of PW and PW4, I find that the said contradiction goes to the gist of their testimony and the whole of prosecution case. These two witnesses were the only arresting officers who arrested the appellant in the National Park with Government Trophies and weapons. Inconsistencies in their testimony as to the time of the arrest raises doubt if the appellant was at all arrested in the National Park. These witnesses testimony on the time of the arrest of the appellant has big difference. PW1 testifying at first that the appellant was arrested at 05:00hrs and later on saying it was 23:00hrs. Both time shows that the appellant was arrested at night hours. PW4 testimony was that the appellant was arrested at 17:00hrs which is day time. As I stated earlier herein, this contradiction is not minor. PW1 and PW4 being the only officers who arrested the appellant testified that they arrested the appellant in the National Park with Government Trophies and weapons. Their evidence was supposed to be consistent especially on the time they arrested the appellant. These being the only eye witnesses against the appellant to have such a major contradiction in their

testimony on the time of arresting the appellant shakes their credibility. Thus, I find that PW1 and PW4 evidence is not credible.

The appellant in his defence said that he was arrested by Park Rangers on 26th October, 2019 at Kitwechembogo area which is outside the National Park and that he was taken to their office. It was on 27th October where he was taken to Biharamulo Police Station. The appellant defence corroborate with that of investigator – PW3 who testified that the file was handled to her on 27th October, 2019. Also, the Chain of Custody Record – Exhibit P2 shows that the said Government Trophies and weapons were received in the Police Station on 27th October, 2019 at 17:00hrs. PW1 and PW4 said nothing about taking the appellant to their office and the date which they took him to the police. This evidence by the appellant proves that the appellant is telling the truth. The appellant's evidence raises doubt that if the appellant was arrested in the Burigi – Chato National Park on 26th October, 2019 by PW1 and PW4 with Government Trophies and weapons, why they decided to take him to their office first and not to the police station direct? There is no reason provided by PW1 and PW4 in their evidence for their decision of taking the appellant to their office first. These witnesses even did not mention the date they took the appellant to the Police Station.

After holding that the evidence of PW1 and PW4 is not credible, and in the absence of any other evidence showing the appellant was arrested in possession

of weapon and Government Trophies inside the National Park, the Court was not in position to conviction the appellant for offences he was charged with. The reason is that there is no sufficient evidence to prove the prosecution case without doubt. The prosecution case was dismantled. As this ground dispose of the appeal, the remaining grounds will not be determined.

Therefore, the appeal is allowed. The conviction of the appellant by the trial Court is quashed and its sentence is set aside. I order for the appellant to be release forthwith from prison otherwise lawfully held for another lawful cause. It is so ordered.


A.E. Mwipopo

**Judge**

18.03.2022

The Judgment was delivered today, this 18.03.2022 in chamber under the seal of this court in the presence of the Appellant and in the absence of the Respondent.


A. E. Mwipopo

**Judge**

18.03.2022