

**IN THE COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA
AT SHINYANGA**

CRIMINAL APPEAL NO. 22 OF 2022

(Arising from Bariadi District Court at Bariadi in Economic Case no 58/2020)

1. MADUHU MAHARAGE
2. MAYAYA S/O NGUSA @ MALUGU }**APPELLANTS**

VERSUS

THE REPUBLIC.....**RESPONDENT**

JUDGMENT

Date of last order 25/1/2023

Date of judgment 24/2/2023

MASSAM, J.

The appellants Maduhu Maharage and Mayaya Ngusa were charged before Bariadi District Court at Bariadi with four counts 1st count unlawful entry into the national park contrary to section 21(1) (a) (2) of the national park Act 2nd count of unlawful possession of weapons contrary to section 24 (1) (b) of the National Park Act .3rd count of unlawful possession of

Government Trophies contrary to section 86 (1) (2) (c) (iii) of the Wildlife conservation Act. 4th count is unlawful possession of government trophies contrary to section 86 (1) (2) (c) (iii) of the wildlife conservation Act.

The case from the prosecution was that on 27th day of October 2020 into duma area in Serengeti national park within Bariadi District and Simiyu region were found into the said area without a written permit of the Director of the wildlife previously sought and obtained, also they were found with the weapons to wit one panga ,one knife and four animal trapping wires.

Again they were found in possession of Government Trophies to wit one fresh piece of wild beast meat, one fresh tail of wildebeest valued at USD 650 equivalent to Tzs 1,508,000/= and one fresh tail of zebra valued at USD 1200 equivalent to TZS 2784000 the property of Tanzania Government without written permit .The appellant denied the charges and prosecution called four witnesses and four exhibits to prove the charge against the appellants.

At the trial the appellants were convicted and sentenced to for first and second count to serve one year imprisonment and for 3rd and 4th count to serve 20 years imprisonment both counts to run concurrently.

Dissatisfied the appellants lodged the present appeal appealing against conviction and sentence. They bought four grounds of appeal thus;

(1) That the trial magistrate erred in law and in fact to hold that the offences which we were charged were proved to the effect that at in the course of the trial court exhibits were showed by the prosecution side.

(2) That the trial court magistrate Court erred in law and facts to receives the exhibits which was totally fabricated and made in climate thus should be considered.

(3) That the search was illegally conducted hence it was not recognized under the eyes of law.

(4) That the trial magistrate erred in law to hold conviction on weak evidence

When the matter was called for hearing the appellants were appeared in persons while the respondent was represented by Ms. Glory Ndoni State Attorney. With the leave of the court the appeal was urged by way of written submission.

Submitting in support of his appeal the appellant's said that trial court erred by convicting them as the prosecution side did not prove their case beyond reasonable doubt.

They said that pw1 he said he called evaluator to identify the said government trophies wildebeest meat and zebra tail, prosecution did not mention the title of evaluator for identification also the said exhibits were burnt before getting the court approval.

Again they said that the record shows that they were arrested with zebra tail, wildebeest meat in the stage of burnt they mention zebra tail, wildebeest meat only they did not mention wildebeest tail where did they left.

Also, they said that they arrested them at 19.00pm night following their foot prints when it was dark already but they said nothing about the source of light used in that time of night, so in their view it is too difficult in night hours to see foot prints without having the light which enable to see clearly.

Again they said the search was not well conducted as it was conducted at 19.00pm night something which is against the law in section 40 Of CPA They added that pw1 and PW2 conducted a search without

being given permission from legal authority to do so because of time which the said search was conducted which is against section 38(1) and (2) of the criminal procedure act cap 20 R.E 2023.

Lastly they pray to this court to allow the appeal, the proceedings of the trial court to be quashed and set aside or any other orders may this court deem fit and just to grant to left them free.

Responding to the appellant submission Ms. Glory Ndoni the State Attorney submitted in replying to the 1st ground that the trial court did not prove their case beyond the reasonable because in the trial no exhibits were shown, she said that in the record shows that the exhibits which were one fresh meat of wildebeest and one fresh tail of zebra were not tendered in court and the reasons that lead to such was stated by Pw3 that were about to perish and the only option was to record on the inventory form which was tendered and was admitted in court as exhibit P3, she added that by looking the said inventory form shows that the order of disposal was taken on 30/10/2020 to dispose the fresh meat of wildebeest and one fresh tail of zebra and the appellants did sign the same and she said that was the procedure provided in section 101 (1) (b) of the wildlife conservation Act no 5 of 2009 and the said inventory was the only

prove of existence of the said perishable items, so the same is the proof that the appellants were found in unlawful possession of government trophies and the charges against them were proved beyond the reasonable doubt.

She added that in responding to the 2nd ground that of appeal the trial magistrate erred in law to receive exhibits which was totally fabricated and made to incriminate appellant's, respondent responded that exhibits were tendered and admitted in court by the prosecution side were panga knife animal trapping wires, certificate of seizure, trophy valuation certificate and inventory form, all exhibits were admitted without any objection and the appellants in cross examination no question was imposed concerning the same, so she pray this court to find that claim as afore thought.

Also, she said that it is the settled law that whoever alleges on existence of a particular fact he or she has to prove that alleged fact exists this under the provision of section 112 of the evidence act which states that *the burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence unless it is provided by law that the proof of that fact shall lie on any other person*"

Also she said that there was no any proof brought by the appellants to make this court to believe that the exhibits tendered were fabricated to incriminate them, so absence of it make their claim baseless.

In replying to the 3rd ground of appeal that the search conducted was not recognized under the eyes of law ,she said that the search was legally conducted as it was conducted by authorized officers to wit PW1 and Pw2 as the law of the wildlife conservation act empowers the wildlife rangers, Park Rangers /conservation Rangers to conduct search when they have reasonable cause to believe a person has committed an offence or is about to commit an offence and such power are vested to them under section 106[1][a] of wildlife conservation cap 283 R,E 2022.She added by saying that the evidence of pw2 show that the search was conducted trophies and weapons were seized in the presence of the rangers and appellants who signed the certificate of seizure, there was no independent witness that is according to the geographical reasons and absence of them did not render the search illegal this scenario was discussed in the case **Tongora Wambura vs. DPP** Criminal Appeal no 212 of 2006 [unreported] which held that *"as to why they were no independent persons to witness the arrest that in our considered view depends on the particular*

circumstances of each case however it should be emphasized that the absence of such people perse did not render the operation illegal or the prosecution case fatal .

So according to the above case in regard to this present case there was no independent person according to the geographical location that was valid and justifiable. In her response on 4th ground of appeal that trial court erred to hold conviction on the weak evidence adduced by pw3 which left the shadow of doubt in her side she said that she don't support that ground as they brought strong and sufficient evidence which found them guilty.

In proving the case prosecution brought four witnesses and Pw1 who was park ranger who said that on 27/10/2020 at Duma river in Serengeti National Park he was with PW2 and they arrested appellants inside the Park searched them and found them with one fresh meat of wildebeest ,one fresh tail of zebra ,one panga, knife and four trapping animals, so evidence of Pw1 proves that appellants did entered unlawful into Serengeti national Park and they were found in possessing the Government Trophies and the weapons.

Again the evidence of Pw1 and Pw2 was collaborated by testimony of Pw3 who identified and conducted evaluation on Government Trophies on 30/10/2020 at Bariadi Police Station on his evaluation he discovered that one wildebeest was killed which amounted to usd 650 and zebra was valued at US dollar 1200 which all equivalent to tshs 4,292,000/= and further filled the inventory form and trophy valuation certificate ,so the prosecution witnesses no 1,2 and 3 all prove the charges against the appellants beyond reasonable doubt hence the respondent herein finds that the duty imposed by on the Republic under section 110 [1] of evidence act was exercised successful.

According to above reasons, she prayed to this court to find the appellants appeal with no merit and dismiss the same and upheld the lower court decision.

I have considered the submission from the both parties appellants ground of appeal the central issue for determination is **whether the appeal has merit**

From record in this appeal, this court finds out that the appellants complained to their ground of appeal that they were convicted by the weak evidence and the court admitted the exhibits which were fabricated, also

they complained about the search that was not well conducted. Respondent in her reply said that the exhibits which brought to the court was proper exhibits to prove the charge of unlawful possession of Government Trophies, the exhibits which were panga, knife, 4 animal trapping machines, certificate of seizure, trophy valuation certificate and inventory form.

Also she said that appellants in cross examination they asked no question about the tendering of the said exhibits, to the issue of search the respondent said that it was well conducted by the Authorized Officers. This court on perusal of the trial court records finds out that there was contradiction on the issue of the exhibits which was found with the appellants, in the evidence which testified in this court show that appellants were found with three trophies which is wildebeest fresh meat, wildebeest tail and zebra tail but inventory did not mention wildest tail to be included in the inventory, and this one did supported by respondent in their testimony which said that in the inventory which was exhibit P3 did not mention wildest tail. Another issue this court finds in the prosecution testimony and creates some doubts was that, the prosecution side brought four [4] witnesses Pw1 and Pw2 who are the game rangers and the ones

who were in patrol and arrested appellants with the said Government Trophies, said a different story, Pw1 said that he find appellants with wildebeest fresh meat, wildebeest tail and zebra tail, Pw2 said that they find appellants with wildebeest fresh meat, one fresh meat which is not wildebeest, one fresh tail of zebra and one fresh tail, PW3 who was a wild life officer and the one who filled the trophy valuation certificate told the court that he saw one fresh meat of wildebeest, one tail of wildebeest and one tail of zebra, Pw4 who was the one who filled the certificate of seizure and inventory form said that appellant were find with fresh meat of wildebeest, One fresh tail of wildebeest and one fresh tail of zebra.

Another evidence from these prosecution witnesses was that appellants were found with possession of panga, knife and 4 trapping wires which they possess it unlawful but the record do not disclose as to whom the exhibits were handed to, the evidence do not show as to the chain of custody of the items seized from the appellants up to the point of when they were taken to court as exhibit, this was well elaborated in the case of **Onesmo s/o Miwilo vs. Republic** Criminal Appeal no 213 of 2010 [unreported]the Court of Appeal finds no proof of chain of custody of the items found regarding the person who take care of them from where

they found up to the point when they were tendered as exhibits in the trial court. The court concluded that without such proper explanation of the custody of those exhibits there would be no cogent evidence to prove the authenticity of such evidence.

Also this was discussed in the case of **Paulo Maduka and others vs. Republic** in Criminal Appeal no 110 Of 2007 the Court of Appeal in insisting the importance of the chain of custody and its effect to the criminal justice it held that ‘ *chronological documentation and /or paper trail showing the seizure custody control transfer analysis and disposition of evidence be it physical or electronic the idea behind recording the chain of custody is to establish that the alleged evidence is in fact related to the alleged crime*’

In this case at hand no explanation brought from all prosecution witnesses who were four on how/where the said exhibits were taken care of from the day the appellants were arrested with until the day they were tendered to the court, the evidence of Pw1 and Pw2 the arresting officer told this court that after arrested the appellants they took them to the police station but no evidence shows that who handed that exhibits at police station and where did they were taken care off after that, in page no

13 Pw1 said that” **we took accused persons to the Bariadi Police station with file no BAR/IR/2057/2020**” That evidence was supported by Pw2 who said the same story but Pw3 who was the wildlife officer told this court that he filled the inventory form to dispose the property which was about to perish and gave it to D.C Riziki who said nothing if they dispose the same or not ,on the trial court record show that the appellants were arrested on 27/10/2020 and the case was started to be heard on 29/4/2021 the prosecution was required to explain where did they put the said exhibits or who was handed that exhibits, in my view the said breakage of chain of custody cause some doubts that if the said exhibits which were tendered to the court are the ones which were found with appellants at the scene ,this court finds that it was need a very careful to follow the handling of what was seized from the appellants up to the time of analysis by the Government of what was believed to have been found on the appellant, this was well elaborated in the case of **Moses Mhagama vs. Government of Zanzibar** in criminal appeal no 17/202 by the Court of Appeal. So according to the said breakage of chain of custody together with the contradiction founds in the witness testimony make this court to believe that the prosecution side failed to prove the

charge of unlawful possession of Government Trophies and unlawful possession of weapons as required by the law.

As for the 1st charge which charged the appellants with unlawful entry into a National Park this court wish to state that whether the section 21 (1) (a) and 2 of National Parks create the offence of unlawful entering into Serengeti National Parks the law is very clear that the case of **Dogo Marwa @ Sigana and Another vs. Republic** Criminal Appeal no 512 Of 2019 reviewing the said provision of the law [**as amended by Act no 11 of 2003**] the court held thus '*it is now apparent that the amendment brought under Act no 11 of 2003 deleted the actus reus [illegal remaining in national part] and got confusion in section 21 [1] of the National Parks Act.* So this court finds out that the position of the law which taken to the case of **Dogo Marwa** and other cases of **Willy Kitinyi @ Marwa vs Republic** Criminal Appeal No 511of 2019 in that case it was held that the appellants were charged with the non-existing offence of unlawful entering in the National Park purportedly under Section 21 [1] [1] and 29 of the National Park Act. Again this court finds out that it is principle of the law that a person should not face criminal punishment except for an act that was criminalized by law before he/she performed the act, in this

present case the appellants were charged under section 21 [1] [a] and 2 of the National Parks Act as amended by Act No. 11 of 2003 which does not create the offence of unlawful entering into a national park so if the said section does not create an offence this means that the appellants in this case were charged in nonexistent offence.

Also it needs to make clear in the case like this to question as to whether or not a given area or place is or is not within the statutory boundaries of the National Parks given the nature of our National Parks and village surrounding it, by looking the 1st appellants defense said that he was at Mwasinasi village cleaning his fields by cutting the trees is when he was invaded by the game rangers ,so it was the duty of the prosecution to tell this court if the Mwasinasi village the place where appellant was arrested was within Serengeti National Park area failure of doing so there was no evidence to prove that the said appellants especially 1st appellant was arrested within the boundaries of Serengeti National Park as it was alleged in the charge sheet. Also because the appellants were charged with the section 21[1] [a] [2] of the National Park Act which was amended under Act no 11 of 2003 which delete the actus reus of the said charge of unlawful entering to the National Park, according to that the appellants in

this appeal were charged, tried, convicted and sentenced for a non existing offence of unlawful entry into Serengeti National Park.

All said and done I find this appeal has merit and I allow it, the appellants conviction sentences in respect of all counts are quashed and set aside. I order for their immediate release from the custody if they are not held for some other lawful cause.

It is so ordered.

DATED at SHINYANGA this 24th day of February 2023




R.B. Massam

JUDGE

24/02/2023