IN THE HIGH COURT OF TANZANIA

(SUMBAWANGA DISTRICT REGISTRY)

AT SUMBAWANGA

DC. CRIMINAL APPEAL NO. 46 OF 2022

(*Originated from the judgment of the District Court of Mpanda at Mpanda in Economic Case No. 01 of 2021***)**

LEONARD S/O MACHO ..... 1ST APPELLANT

LUCAS S/O BEDA@NGOZI ..... 2ND APPLELLANT

VERSUS

REPUBLIC ..... RESPONDENT

JUDGMENT

21ST February & 10th May, 2023

MRISHA, J

The appellants both Leonard Macho and Lucas Beda@Ngozi were arraigned in the District Court of Mpanda at Mpanda on charged with three counts; one unlawful entry into the National Park contrary to section 21(1)(a) and (2) of the National Park Act, [Cap 282 R.E. 2002 as amended by Act No. 11 of 2003. The second count was unlawful possession of weapons contrary

to section 24(1) (b) and (2) of the National Park Act. The third count was Unlawful possession of Government Trophy contrary to section 86(1) and 2(c) (iii) of the Wildlife Conservation Act No. 5 of 2009 read together with Paragraph 14 of the First Schedule to and section 57(1) and 60(2) of Written Laws (Miscellaneous Amendments)(No. 2) Act No. 4 of 2016 read together with paragraph 14 of the First Schedule to and section 57(1) and 60(2) of the Economic and Organized Crime Control Act, [Cap 200 R.E 2019]. The contention by the prosecution at trial was that on 24th day of December, 2020 at Lukima area in Katavi Region National Park within Mpanda District, Katavi Region, the two accused persons entered in the National Park without a written permit, the accused persons were found in possession of one Panga, two hand axes, within the National Park. Further, the two accused were found with possession of 637 piece of Lava valued at USD 6370 equivalent to Fourteen Million Six Hundred Fifty Thousand Seven Hundred Ninety-six cents nine (Tshs. 14,656,796.9/=) the property of Tanzania Government without a permit thereof.

Being unsatisfied with the conviction and sentence of the trial court, the appellant came before this court armed with two grounds of appeal. I take liberty to list their grounds of appeal thus:

1. That, the trial court erred at law and fact to convict the Appellants with the offence of Unlawful possession of the Government trophy which was not proved beyond reasonable doubt.
2. That, the trial court erred at law and fact by convicting the appellants on the weakness of the evidence of the defence instead of the strength of prosecution evidence.

At the hearing of the appeal before this court, the appellants were present, legally unrepresented, whereas the respondent was represented by Ms. Safi Kashindi, Learned State Attorney. The appellants took off their journey of fighting for their liberty by requesting this court to adopt their grounds of appeal and sent them free. They finally attempted to convince this court to accept their appeals as all their grounds of appeals are self-explanatory and well prepared; hence they did not have more explanation.

On the other side of the coin, Ms. Safi Kashindi supported both the conviction and sentence passed by the trial court. She submitted on the first ground of appeal raised by the appellants that who allege must prove before the court, she referred section 110(1) of Evidence Act, Cap 6 R.E. 2022. In proving the charged offences, the prosecution side provided a total of six witnesses. The three witnesses, one being PW1 who is Wildlife

Officer, Katavi National Park his evidence is shown at page 16 of the proceedings, the second being W2 who is a Park Ranger, Katavi National Park his evidence is shown at page 23 of the typed proceedings, and PW4 who is a Park Ranger, Katavi National Park whose evidence is shown at page 32 of the said proceedings. All three witnesses are wildlife officers at the Katavi National Park, they are arresting officers and testified on how they arrested appellants and found them in possession of weapons inside National Park.

To prove what was stated by the said witnesses was factual and true, Ms Kashindi argued that the 2nd Appellant did not cross examine all the three witnesses when the court gave him the chances of doing so. That confirms that what was testified by the said prosecution witnesses was true. She cemented her argument by referring this court to the case of **Martin Misara v Republic**, Criminal Appeal No. 428 of 2016 (unreported) CAT Mbeya at page 8 in which it was stated that:

> *"As a matter of principle, a party who fails to cross examine a witness on a certain matter is deemed to have accepted that matter and will be estopped from asking the trial court to disbelieve what the witness said".*

Further, she referred at page 46 of the typed court proceeding and submitted that the 2nd Appellant did not object his cautioned statement to be admitted as an exhibit and marked as exhibit P4, though she noted that the contents of the two cautioned statements were not read over before the court. Hence, she prayed this Court to expunge exhibits P4 and P5 from the record as no inquiry was conducted to admit the same.

Furthermore, she submitted that the evidence testified by three witnesses was correct and the witnesses were credible. She referred this court to the case of **Goodluck Kyando v Republic,** TLR 2006 at page 367; and concluded by saying that the prosecution proved their case beyond reasonable doubts.

Regarding the second ground of appeal, Ms. Safi Kashindi argued that the trial court analyzed and consider the evidence of prosecution side and defence side, but it seems the appellants challenged the trial court for not considering their defence. She contended that this Court is in a position to consider the evidence of the defence case, where the defence evidence has not being considered by trial court, and come up of its own conclusion.

Having heard all the submissions by both parties in this case, I think this appeal can conveniently be disposed of by a thorough scrutiny of the evidence in record so as to ascertain whether or not the prosecution witnesses were credible and worth of belief on the incidents of unlawful entry into the National Park, unlawful possession of weapons and unlawful possession of the Government trophy.

It is a settled law that the best test for the quality evidence is based on the credibility of witness. This position of the law was stated in the case of **Shabani Daudi v. Republic**, Criminal Appeal No. 28 of 2001(unreported) the Court stated that:-

> *"Credibility of a witness is the monopoly of the trial court but only in so far as demeanor is concerned. The credibility of the witness can also be determined in two other ways. One, when assessing the coherence of the testimony of that witness and two, when the testimony of that witnesses is considered in relation to the evidence of other witness including that of the accused person. In those two occasions, the credibility of a witness can be determined even by a second appellate*

To bolster her proposition, she referred this court to the case of **Jafari Mussa v Republic**, Criminal Appeal No. 234 of 2019 page 11 wherein it was stated that:

> *"In the past, failure to consider defence case used to be fatal irregularity however with the work of progressive jurisprudence brought by case law the position has changed. The position as it is now where the defence has not being considered by Court below, this Court is entitled to step in the shoes of the first of the appellate Court to consider the defence case and come up of its own conclusion".*

Having said all the above, the learned State Attorney submitted that the appeal lodged by the appellants has no merits, thus she prayed that the same be dismissed and prayed this court to upheld the conviction and sentence.

In rejoinder, the appellants told this court that they had nothing to add rather than praying to this court to consider their grounds of appeal and set them free.

court when examining the findings of the first appellate court".

On the other hand, I am aware of the settled position that, where the defence has not being considered by Court below, this Court is entitled to step in the shoes of the first of the appellate Court to consider the defence case and come up of its own conclusion.

Guided by the above settled position, I intend to consider the evidence laid at the trial court in relation to the verdict reached, that is, the conviction and sentence of the appellants in connection of the offence charged.

Admittedly, I agree with the learned State Attorney that the exhibit P4 the cautioned statement of 2nd Appellant should be expunged from the court record. Indeed, the record is clear that exhibit P4's contents were not read over to the appellants as required. The reason behind the said requirement is to let the accused to know and understand the contents of the same. The law is settled that, failure to read out the contents of exhibit after admission in evidence is an incurable irregularity as it violates the accused's right to a fair trial (the appellants in the case at hand). In case of **Robinson Mwanjisi and 3 others v Republic** (2003) TLR 2018, the Court stated among other things:-

"Whenever it is intended to introduce any document in evidence, it should first be cleared for admission and be actually admitted, before it can be read out..."

As rightly submitted by Learned State Attorney, the effect of such an irregularity is to expunge respective document from the record. See the case of **Sunni Amman Awenda v Republic**, Criminal Appeal No. 393 of 2013 (unreported).

Regarding exhibit P5 be expunged from record due to some procedural irregularities which were committed by the trial court, I concur with the submission of the learned State Attorney that the exhibit P5 the cautioned statement of 1st Appellant should be expunged from the court record as remedy. It is trite law that, an inquiry or trial within trial has to be conducted when the accused person objects admission of the cautioned statement on ground that the accused person denied to have recorded the cautioned statement. This position has been emphasized in the case of **Twaha Ally and 5 others v Republic**, Criminal Appeal No. 78 of 2004, CAT (unreported).

"If that objection is made after the trial Court has informed the accused his right to say something in connection with

alleged confession, the trial Court must stop everything and proceed to conduct an inquiry (or a trial within trial) into the voluntariness or not of the alleged confession. Such inquiry should be conducted before the confession is admitted in evidence".

The 1St appellant objected admission of cautioned statement with the following words, *"I object the admission of the said caution statement as I didn't give any statement at the police station. On that date only my particulars were taken. And I was asked by the other person and not PW5".* That was a ground for the trial Court to conduct the inquiry. The trial Court was not correct to admit the cautioned statement, I therefore concur with the Learned State Attorney to expunge exhibit P5 to the record.

Back to the evidence remained in the record, the question will be whether the remaining prosecution evidence is sufficient to warrant conviction against the appellants herein? The cardinal principal of our criminal law is that the one who alleges existence of a certain fact must prove its existence. This can be ascertained from the provisions of the TEA as well as the case law. Section 110(1) and (2) of TEA provides that:-

(1) "Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist..."

(2)"When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person"

The duty of the prosecution side before the trial court was to prove all the ingredients of offence which the appellants stood charged. In the first court, the prosecution side was supposed to prove beyond any reasonable doubt, that they were found in the National Park without permit, two that they found with unlawful possession of weapons and, three that they were found with unlawful possession of Government trophy. To prove the said ingredients, the prosecution side brought PW1, PW2 and PW4 who are wildlife officers and park rangers of Katavi National Park; they arrested the appellants on 24/12/2020 at Ruchima area within Katavi National Park when they were cutting trees; the appellants were searched and found with two axes, one machete which was admitted as exhibit P1 and three kilogram of lavas (637 pieces) valued at USD 6370 equivalent to fourteen million six hundred fifty thousand seven hundred ninety six cents as per

certificate of valuation which was admitted as P3 and form part of oral evidence.

The certificate of seizure was filled by PW1, both appellants signed the certificate as well as PW2 signed as a witness, certificate of seizure was tender as exhibit though was objected, however the objection was overruled and such document was admitted as exhibit P2 and formed part of prosecution evidence. During trial, the appellants were given right to cross examine the prosecution witnesses, but I found it strange to the 2nd appellant who forfeited his right of cross examine the prosecution who are witnesses PW1, PW2, PW3, PW4, PW5 and PW6.

It is the law that failure to cross examine witness on a vital point, ordinarily implies the acceptance of the truth of the witness evidence. As rightly submitted by the learned State Attorney, on the authority of **Martin Misara** (supra) and a number of authorities on that point, failure to cross examine a witness on a certain matter is deemed to have accepted the matter. This position was also stated in the case of **Nyerere Nyague v Republic**, Criminal Appeal No. 67 of 2010 (unreported) that:-

"As a matter of principle, a party who fails to cross examine a witness on a certain matter is deemed to have accepted that matter and will

be estopped from asking the trial court to disbelieve what the witness said"

The trial court's record reveals that the 2nd appellant did not cross examine prosecution witnesses on the issue of entering into the National Park without permit, he did not cross examine on the issue of unlawful possession of weapons. Neither did he cross examine on issue of being found in unlawful possession of Government trophies. On the authorities cited above, I conclude that the evidence of prosecution side adduced before the trial court against the 1st and the 2nd appellants is credible and worth of being believed.

Furthermore, the evidence of PW1, PW2, PW3 and PW4 testified during the trial court was credible, and the exhibits admitted and cleared by the trial court to form part of the prosecution evidence sufficiently proves the charged offences beyond any reasonable doubts.

Regarding the second ground of appeal the appellants' laments that their defence was not considered by the trial Court. I am aware to the settled law that, the trial Court is duty bound to analyze and consider the evidence adduced by the defence. Failure to consider the defence is fatal. This position was stated in **Sadick Kitime v R**, Criminal Appeal No. 483 of

2018(unreported) where the Court cited with approval its decision in **Moses Mayanja@Msoke v R**, Criminal Appeal No. 56 of 2009 that:

> *"...it is now trite law that failure to consider the defence case is fatal and usually vitiates the conviction"*

As rightly argued by Ms. Kashindi the appellants' defence in the case at hand was considered by the trial Court. This is reflected at pages 6, 7 and 8 of the typed judgment which provides a summary of defence evidence of the appellants. The trial Court was of the firm view that, the two appellants admitted to be at Ruchima, but according to them Ruchima is outside the National Park. As to the 2nd appellant defence was that, he was on way to Ruchima, but he got lost and cough by Park Rangers, this is reflected at page 10 of the type judgment. The trial Court concluded that being unaware draw an inference that it's possible he found himself inside the National Park without knowing it.

Further, the trial Court considered defence evidence when dealing with the offence of unlawful possession of weapons into the National Park and stated that DW1 and DW2 did not say anything regarding this offence. They only objected the admission of the exhibit, the objection which was overruled; this is reflected at page 11 of the type judgment. Indeed, the

trial Court evaluated defence evidence and concluded that the "two accused did not say anything into their defence regarding this offence; their silence is treated as admission to the offence that there were possessing weapons inside the National Park".

Ultimately, from the foregoing, I am settled that trial Court consider defence evidence when evaluating the evidence of both prosecution side and defence side and come with the conclusion that the appellants were guilt of the offences to which they stand charged despite the absence of exhibits P4 and P5 which were expunged due to procedural irregularities.

In the upshot, I dismiss the appellants' appeal for being devoid of merit as I have reasoned above, and upheld conviction and sentence of the trial Court. Right of Appeal explained.

I so ordered.

A.A. MRISHA
JUDGE
10/05/2023

Date - 10/05/2023

Coram - Hon. M.S. Kasonde, DR

1st Appellant - Present in person

2nd Appellant - Present in person

Respondent - Ms. Godliver Shio & Maula Tweve State attorney

B/C - J.J. Kabata

Ms. Godliver Shio –State Attorney for Respondent: This matter comes for Judgment and we are ready.

1st Appellant: We are prepared too.

2nd Appellant: Me too.

Court: Judgment delivered this 10th day of May, 2023 in the presence of Ms. Godliver Shio assisted by Maula Tweve, learned State attorneys for the Respondent and in the presence of both appellants in person.

Sgd: M.S. Kasonde
Deputy Registrar
10/05/2022

Right of Appeal to the Court of Appeal fully explained.

M.S. Kasonde
Deputy Registrar
10/05/2022