IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MUSOMA SUB REGISTRY

AT MUSOMA

CRIMINAL APPEAL NO 63 OF 2022

(Arising from Serengeti District Court at Mugumu Economic Case no 11 of 2021)

1. **JUMA S/O SAMBAGANE @ MAHITI**
2. **NANDI NDAZI @ NKONDO** ..... **APPELLANTS**
3. **MWITA S/O SEMBELI @ MTABUTO**

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

21st March & 5th May, 2023
F. H. Mahimbali, J:.

The appellants in this case were convicted by the trial court for three offences of unlawful entry into the National Park, unlawful possession of weapons in the National Park and unlawful possession of government trophies and were accordingly sentenced. It has been alleged by the prosecution that on 27th day of February 2021 at Lomoti area within Serengeti National Park within the district of Serengeti in Mara region were found being within the National Park illegally and in unlawful possession of

weapons to wit: one knife, panga and sime within the National Park and also in unlawful possession of government trophies to wit: five pieces of dried meat of impala and dried skin of impala, five pieces of dried meat of topi and one dried skin of topi animal. The charged offences are said to be offences under section 21(1)a, (2) and 29(1) of the National Parks Act (first account), section 24(1)b and (2) of the National Parks Act (second count) and section 86(1) (2) (c) (iii) of the Wildlife Conservation Act, Act No. 5 of 2009 read together with paragraph 14 of the first schedule to and section 57(1) and 60 (2) both of the Economic and Organized Crime Control Act, Cap 200 (offences in third and fourth counts). The appellants had disputed the charges levelled against them at the trial court, thus compelled the prosecution to summon a total of four witnesses in establishing the charge.

In establishing the offences charged, PW1 testified how together with PW3 they arrested the appellants at Lomoti area which is said to be within Serengeti National Park while being in possession of the abovenamed alleged weapons and government trophies (exhibit P1 & P2) which are certificate of seizure and the alleged weapons. Pw2, testified how he identified the said pieces of dried meat and the dried skins as being of

impala and topi and tendered the valuation and inventory reports (Exhibit P3 and P4) respectively.

Upon hearing of the case, the trial court convicted the appellants and dully sentenced the appellants. Aggrieved by both conviction and sentence, the appellants appealed to this court armed up with a total of four grounds of appeal, namely:

1. *That the trial magistrate erred in laws and facts in convicting and sentencing the appellants by admitting wrong evidence by the prosecution side via PW1, PW2, PW3 and PW4.*
2. *That the trial magistrate erred in law and fact in convicting and sentencing the appellants as they were not involved during the disposition of government trophies and that they did not take part of it.*
3. *That there were no any exhibits tendered by the prosecution at the trial court in establishing their case against the appellants.*
4. *That there was admission of wrong prosecution exhibits at the trial court.*

During the hearing of the appeal, the appellants appeared in person – unrepresented whereas the respondent was dully represented by Mr. Nchanilla, learned state attorney. The appellants had nothing material to submit before the Court in support of their appeal but just prayed to adopt

their grounds of appeal to form part of their appeal submission and that through them, their appeal be allowed.

Mr. Nchanila learned state attorney in resisting the appeal, he considered all the grounds of appeal as misplaced and thus they be dismissed for being unmerited.

With the first ground of appeal, he responded that what PW1, PW2, PW3 and PW4 testified was as per law. They had taken oath, thus pursuant to section 127 (1) of the TEA, them being competent witnesses, he wondered why they are accused of testifying wrong evidence in the absence of establishing the said wrongness. Considering the whole of prosecution's witnesses (PW1-PW4), it is within the whole fours under section 62 (1) of TEA, adding that what PW2 had testified fits to be evidence under section 62 d of TEA (expert opinion).

As per typed proceedings from what has been by all the prosecution witnesses (page 32-34 for PW1, pages 36-41 for PW2, pages 44-45 for PW3 and what has been testified by PW4 as reflected in pages 45-46), he argued that he has not seen any wrong evidence by the prosecution as alleged. The appellants were duty bound to establish the said wrongness in

the alleged evidence by PW1 to PW4. He concluded on this ground of appeal by making summary of the evidence that, PW1 and PW4 are just arresting officers (game rangers), Pw2 is the wildlife officer who valued the said trophies and PW3 is the police officer who prepared the inventory. Therefore, ground no 1 is devoid of any merit and it be dismissed.

With grounds 2,3, and 4, he argued them jointly. He submitted that the argument that the said trophies when being disposed of, the appellants were not involved, the evidence of PW2 (page 38-39) he countered it as it is clear as per trial court record how the said trophies and the appellants were taken to court. PW3 (page 44-45), also testified how he took the appellants with their trophies to the court (exhibit PE4). The said PE4 exhibit as per page 39 was admitted without being objected. The said PE4 exhibit at its back is very descriptive how the appellants were involved during the inventory proceedings and made their replies there to.

He added that, when you go through the trial court's judgment at page 9 shows how the appellants were fully involved. In the case of **Mohamed Juma @ Mpakama vs Republic**, Criminal Appeal No 385 of 2017, CAT at Mtwara (unreported), the CAT directed that where there is

perishable good/exhibit, it can be admitted through inventory form in lieu of physical exhibit.

Therefore, the argument that there were no any exhibits tendered in court, he considered it as baseless as the prosecution brought a total of four exhibits. In his submission, he elaborated that PE1 exhibit is a ceritificate of seizure (See page 31). Exhibit PE2 refers to weapons arrested with the appellants (See page 32 of the typed proceedings). The said weapons are knife, panga and sime. PE3 exhibit is the certificate value (page 36). PE4 is the inventory form. As per court's proceedings, all these exhibits were dully tendered in court and the same were not objected. As they were not objected during their admission, they cannot be challenged now at appeal (**Robison Mwanjisi and 3 others vs Republic** (2003) TLR 218). On this submission, he prayed that all these grounds of appeal be dismissed for want of merit and so the appeal itself.

When probed by the Court regarding the relevancy of the offences charged in counts 1 and 2 of the charge sheet, with the first offence of unlawful entry into the National Park (section 21 (1) b of Cap 282), he admitted that the charging section does not create an offence (see the case of **Dogo Marwa @ Sigana and Mwita Baitom @ Mwita vs**

Republic, Criminal Appeal no 512 of 2019). He thus faulted conviction and sentence in respect of the first count and prayed that the conviction and sentence emanating thereof be quashed and set aside.

With the offence in the second count of unlawful possession of weapons within the National Park, he submitted that the position of the law is, for such an offence to stand, the arresting officers (PW1 and PW4), must have clearly stated that the point of arrest is within the National Park. In this case, the point of arrest is said to be at Lomoti Area (Lomoti Area). If it is not within Serengeti National Park, there ought to have been dispute on that. In the current case, the evidence of defense disputes being arrested at Lomoti area but Rubanda area (river) without saying where is the said Rubanda. Therefore, to him, since there is no dispute that Lomoti area (point of arrest) was within Serengeti National Park, then the offense is established. As per exhibit PE4 (inventory form), both accused persons before the magistrate (at back) each one admitted so in their reply, he considered it as amounting to admission/confession thus relying in the case of **Mohamed Haruna Mtupeni vs Republic,** Criminal Appeal No 259 of 2007, CAT as referred by in the case of **Jacob Assegelile Kakune vs DPP,** Criminal Appeal No 178 of 2017, CAT at Mbeya at page 14 stated on

the best evidence of the accused person confessing his guilty. Therefore, what was admitted at PE4 cannot be disputed now. So long as the point of arrest was not disputed, then, the position in the case of **Mosi Chacha Iranga vs Republic,** Criminal Appeal no 508 of 2019 is distinguishable in the circumstances of the current case.

As regards the offences in the 3rd and 4th counts of unlawful possession of government trophies, he was of the considered view that the charge on unlawful possession of government trophies, were dully proved as the ingredients of this offense are two: There must be trophy, the said trophies are unlawfully owned. As all these ingredients as per testimony of PW2 (page 37 of the typed proceedings) is clear on that what was arrested with was trophy, he therefore prayed that the appeal be dismissed.

The appellants in their rejoinder submission maintained that they were not arrested at Lomoti area as charged but at Rubanda which is not within the perimeters of Serengeti National Park.

In digest to the all grounds of appeal and the submissions of the parties, the vital question for consideration in disposing of this appeal is

one, whether the prosecution's case was established beyond reasonable doubt as per law.

With the first count of the charged offences, it is clear that the said offence of unlawful entry within the National Park does not exist pursuant to section 21(1) and (2) of the National Park Act Cap 282 R. E. 2019. Thus, it is right as per Mr. Nchanilla's concession that the appellants were wrongly charged with the said section. For clarity the said section reds:

> *21.- (1) Any person who commits an offence under this Act shall, on conviction, if no other penalty is specified, be liable -*
>
> *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 year or to both that fine and imprisonment;*
>
> *b) In the case of a company, a body corporate or a body of person to a fine not exceeding one million shillings.*
>
> *2) Any person who contravenes the provisions of this section commits an offence against this Act.*

Whether this section creates any offence, the Court of Appeal of Tanzania in one of its recent decisions made it clear that the wording of the said section does not create any offence for one to be liable ((see the

case of **Dogo Marwa @ Sigana and Mwita Baitom @ Mwita vs Republic,** Criminal Appeal no 512 of 2019).

As regards the offence in the second count, (unlawful possession of weapons in the National Park), Mr. Nchanilla was aware of the legal position that for one to be convicted of this offence, it must be established that the said point of arrest must be within the coordinate points of the statutory boundaries of Serengeti National Park (see also (see the case of **Dogo Marwa @ Sigana and Mwita Baitom @ Mwita vs Republic,** Criminal Appeal no 512 of 2019). However, he was of the view that since the appellants are alleging that they were arrested at Rubanda and not at Iomoti area as charged, he considered the argument as an afterthought and does not stand in the circumstances of this case. I have a different observation on this. As the appellants pleaded not guilty to the charge, then the Republic were duty bound to establish all the ingredients making the offence. Since it is the prosecution's duty to establish the charge beyond reasonable doubt, that duty has never been shifted to the accused person.

This being a criminal case, it is worthy and instructive to look at what section 110 and 112 read together with section 3 (2) (a) of the Evidence

Act [Cap 6 RE 2019] says in as far as the burden and standards of proof is concerned. It is the law that an accused person is only convicted upon proof beyond reasonable doubt by the prosecution that the offence has been committed and it is the accused person charged who is responsible (See **Christian Kale & Another Vs. The Republic** (1992) T.L.R 302 CAT and **John Makorobera & Another Vs. The Republic** (2002) T.L.R 296). In the above cases, it has been insistently held that the accused person should only be convicted of an offence he is charged with on the basis of the strength of the prosecution case not on the weakness of the defence case.

In line with this principle of burden and standard of proof, another important principle becomes necessary as enunciated in the case of the case **of Mariki George Ngendakumana Vs The Republic,** Criminal Appeal No. 353 of 2014 CAT - Bukoba (unreported), which inter alia held that:

> "*It is the principle of law that in Criminal Cases the duty of the prosecution is two folds, one to prove that the offence was committed, two that it is the Accused person who committed it*"

That means, it was the responsibility of the Republic first and foremost to make it legally clear that, this being an offence of being in unlawful possession of weapons within the National Park, it could only stand conviction if there is evidence that at the point of the appellant's arrest was really within a prohibited area. This is because a mere possession of panga, knife or sime in other ordinary places, has never been an offence as per law. In the current case, it is evidently clear that the prosecution failed to discharge their mandatory duty of establishing the offence. As it forms the basis of the charge, it remains a speculation that the whole of the Lomoti area is within Serengeti National Parks, which is legally wrong to make such an assumption relying on the testimony of PW1 and PW4 which do not provide the coordinate points of the arresting zone is within the National Park as charged. That said, the second count of being in unlawful possession of weapons within the National Parks was not established as per law, thus appellants' conviction and sentence are faulted and set aside as well.

With the third and fourth counts which involve unlawful possession of government trophies (impala and topi) within Serengeti National Park, I find the evidence thereof wanting. It is wanting because, first it is not clear

whether at the point of their arrest was really within the statutory boundaries of the established coordinates of Serengeti National Park. Secondly, it is not clear whether the purported features of the alleged trophies had clearly established the scientific descriptive features of impala and topi animals. As to why the said exhibits are impala and topi (exhibit p3 and p4) the said expert witness says, I quote:

> *" ... I identified them as follows: five pieces of dried meat of impala were more less dark brown to grey. Meat fibers were in a small scale, meat fat were in a thick cover at most 2 inches. Its dried skin was in reddish brown color. In under part was whitish color, had black tufts. Looking on five dried pieces of topi, were grey to dark brown colors, meat fiber was in a large scale with whitish meat fat in a large scale. The dried skin of topi has chest nut brown color with purplish to blue patches...."*

Is this evidence scientifically/expertly reliable that it belongs to none of the domestic animals save the mentioned wild animals? I am aware that an expert opinion must be respected, however where there are good reasons for differing from it, the Court is justified to do so (See **Saidi Mwamwindi v. Republic** (1972) HCD 212). In the current case, the witness (PW2) despite being a wildlife officer, that amongst his duties are

identification of government trophies and doing valuation, it was expected from him to tell the court how such described features are unique and are only possessed by these wild animals and not any other. In the absence of that uniqueness, it is hard for one to get persuaded that what was said is nothing but the scientific features of topi and impala. Considering that the conviction of such an offence entails a minimum custodial sentence of 20 years, the proof of it must be very clear and convincing.

All this said and done, this Court finds merit in the appeal. I thus allow it, quash conviction and set aside the sentence. The appellants are thus set free unless lawfully held by other causes.

DATED at MUSOMA this 5th day of May, 2023.

F.H. Mahimbali

Judge

Court: Judgment delivered today the 5th of May, 2023 in the presence of the appellants linked from Mugumu prison and Mr. Abdulkheri Ahmad Sadiki learned state attorney and Mr. Makunja SRMA, present in Chamber Court.

F.H. Mahimbali

Judge