IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MUSOMA SUB REGISTRY

AT MUSOMA

CRIMINAL APPEAL NO 61 OF 2022

(Arising from Serengeti District Court at Mugumu, Originating Economic Case No 25 of 2021)

SAMWEL S/O MWIKWABE @ MWITA ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

JUDGMENT

23rd March & 5th May, 2023
F. H. Mahimbali, J:.

The appellant and his fellow (not part of this appeal) after being convicted by the trial court on the three charged economic offences and dully convicted, has been aggrieved by both conviction and sentence, thus the basis of this appeal which is founded on four grounds of appeal.

It was alleged by the prosecution that on 22nd day of April 2021, the appellant was arrested at Limana area which is alleged to be within Serengeti National Park without permission. This is an offence pursuant to

section 21(1)a (2) and section 29 (1) of the National Parks Act, Cap 282 R.E 2002.

Furthermore, on his arrest at the Limana area, he was found being in unlawful possession of weapons namely two spears, two knives, and three trapping wires also without permission which is an offence contrary to section 24(1) (b) and (2) of the National Parks Act, Cap 282 R. E 2002. Moreover, the appellant was also found being in unlawful possession of government trophies to wit: two fresh limbs of zebra meat. This is an offence contrary to section 86 (1) and (2)(c)(iii) of the Wildlife Conservation Act, Act No. 5 of 2009 as amended by the Written Laws Miscellaneous Amendment Act, Act No. 2 of 2016 read together with sections 57(1) and 60 (2) both of the Economic and Organized Crime Control Act Cap 200, R.E 2019).

All this is as per testimony of PW1, PW2, PW3 and PW4 and exhibits P1, P2, P3 and P4. Upon hearing of the case, the trial court convicted the appellant and his one fellow accused person (not part to this appeal) and dully sentenced them as follows: 1st and 2nd counts, each one-year custodial sentence. As regards to the third offence, the appellant was sentenced to serve a custodial sentence of 20 years in prison.

This finding of guilty and the imposition of the appropriate sentence by the trial court is what aggrieved the appellant thus the basis of the current appeal propped on four grounds of appeal which condensed and paraphrased can only be two grounds of appeal:

1. *That the procedure on inventory proceedings were not dully complied with as per law as the appellant was not involved.*
2. *That the prosecution's case was not established beyond reasonable doubt as per law.*

During the hearing of the appeal, the appellant was self-represented whereas Mr. Byamungu learned advocate represented the respondent/Republic. The respondent prayed this Court to adopt his grounds of appeal to form part of his appeal submission adding that there was no any credible evidence adduced by the prosecution, therefore his appeal be allowed.

Mr. Byamungu on his part, conceded with the appeal only on the first count but for legal reasons. He however, resisted the appeal on the rest of the counts as per raised grounds of appeal.

With the first count of unlawful entry into the National Park contrary to section 21 (1) a (2) and 29 (1) of the National Park Act, he submitted that reading the law there is no legal offence of unlawful entry into the National Parks. Therefore, he was wrongly charged and convicted (he invited this Court to the case of **Bubuya Marwa Mwita vs Republic,** Criminal Appeal 77 of 2019, High Court Musoma), it was held that offence of unlawful entry into the National it is not existing as per law.

As regards to the other counts, he responded them as follows.

- That the appellant is being victimized, is not true. There is no proof of it. However, though the 2nd accused person was discharged, however there was basis for that. First, he pleaded guilty as he was a minor of 16 years. As he admitted the commission of offence and convicted, he was discharged merely because he was a minor and not otherwise.

With the 3rd accused, he appears to be admitted on bail (see page 33). As he jumped it, the case proceeded exparte against him, and was dully convicted and that his sentence shall commence running after his arrest (see pages 2 of the trial court's order after the judgment).

In consideration to the grounds of appeal, he was of the considered view that the first ground is baseless. He clarified that an offence possession of weapons unlawfully within the National Parks and unlawful possession of trophies are two different offences. However, as per evidence of PW1, he clearly stated how the said weapons were used as instruments of crimes. Therefore, that was an offence by itself.

On the second ground of appeal attacking the PW3's testimony that what is stated into the charge sheet varies from the testimony of PW3, it was argued that there is nothing of variation/discrepancy as claimed. However, reading the testimony of PW3 it is clear how, the said trophy was identified. In his considered view, Zebra is a unique in its description. As per section 122 of TEA, the appellant's argument at this appeal stage appears to be strange as it cannot be entertained by this court now.

With the third ground of appeal that he was not involved in inventory proceedings, he countered it as being baseless in consideration of exhibit PE4 which states clearly how the appellant and his colleagues were arraigned before the honorable Justice of Peace and the proceedings before the said exhibit was ordered to be destroyed and in their presence. Therefore, the argument that they were not involved is not true as the

legal conditions set in the case of **Mohamed Juma Mpakana** were complied with (see **Mohamed Juma Mpakana,** Criminal Appeal No 385 of 2017, CAT at Mtwara). That he was not involved during destruction is not a legal requirement.

As regards to the 4th ground of appeal, the same lacks basis as per submission above. Otherwise, there ought to have been cross examination on that aspect and not now.

When probed by the Court whether there has been proof that the point where the appellant was arrested was within the National Park as per law, he submitted that it is true that there has not been demonstrative evidence that the appellant was actually arrested within the National Park, however there is associated evidence/perceived evidence that the appellant and his colleagues were found within the National Park as per preliminary hearing proceedings in respect of the 2nd accused person.

As a conclusion, he considered the defense testimony of the appellant as telling lies and thus corroborates the prosecution's case. He thus, prayed that the appeal in ground no 2 and 3 be dismissed as well.

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. 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 years 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. Byamungu 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, she was of the view that since the appellant did not dispute the point of his arrest (korongo la Machwechwe) being within Serengeti National Park, she considered the argument as an afterthought and does not stand in the circumstances of this case. I have a different observation on this. Since it is the prosecution's duty to establish the charge beyond reasonable doubt, that duty has never been shifted to the accused person. It remains the prosecution's duty to establish so.

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 two spears, two knives, and three trapping wires 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 Limana area is within Serengeti National Park, which is legally wrong to make such an assumption relying on the testimony of PW1 and PW2 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 appellant's conviction and sentence are faulted and set aside as well.

With the third count which involves unlawful possession of government trophies (two fresh limbs of Zebra) within Serengeti National Park, I find the evidence thereof wanting. It is wanting because, it is not clear whether at the point of his arrest was really within the statutory boundaries of the established coordinates of Serengeti National Park. That means what is stated in the particulars of the charge sheet that the point where the appellant was arrested being in unlawful possession with the said government trophies at Limana area is within Serengeti National Park, I find it being a variation between the evidence and the particulars of the charge. In essence, I am aware that a possession of government trophy is an offence regardless the point in which one is arrested with. It being a government trophy, it remains an offence regardless whether one possesses them while within the National Park/ Game Reserve or in other ordinary places within the territory of the United Republic of Tanzania. However, in my considered view as per circumstances of this case, the Republic failed to establish the charge whether the appellant was arrested within the National Park as charged. As per that variation, the Republic was duty bound to charge the appellant as per correct facts of the case. Since

in count two there has been no proof that the appellant was arrested within the National Park as alleged.

All this said and done, this Court finds merit in the appeal. I thus allow it, quash conviction and set aside the sentence. The appellant is 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 and Mr. Abdulkheri Ahmad Sadiki learned state attorney and Mr. Makunja SRMA, present in Chamber Court.

F.H. Mahimbali

Judge