IN THE HIGH COURT OF TANZANIA

MUSOMA DISTRICT REGISTRY

AT MUSOMA

CRIMINAL APPEAL NO. 122 OF 2022

(Originated from Economic Case No. 34 of 2021 of the District Court of Tarime at Tarime)

NDAGU NYAMHANGA ROBARE..... APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

JUDGMENT

22nd & 26th June, 2023

M. L. KOMBA, J.:

The appellant in this case was charged with three counts and convicted on two of them by the District Court of Tarime at Tarime. The three counts namely; Unlawful entry into the National Park, unlawful possession of weapons and unlawful possession of Government trophies. The prosecution alleged that on the 9th day of August 2021 at Korongo la Matoro area in Serengeti National Park the appellant was found to have entered into the National Park without permit and in possession of weapons to wit one machete and four trapping wires without permit. Also, he was found in possession of Government trophies to wit two hind limbs fresh meat of wildebeest. The appellant was arrested and arraigned before the district

court of Tarime at Tarime. The appellant denied the charges levelled against him.

In order to prove its accusations, the prosecution brought a total of four witnesses; Venance Muhoni (PW1) together with Stephen Sabai (PW3) who are conservation rangers, who testified that on the 09/8/2021 while on normal duty patrol with Charles Chacha at Korongo la Matoro within Serengeti National Park, they saw footprints of mabondo (she made from car tyres) leading to the bush, they surrounded the bush, they heard some movement in that bush and they found a person whom they ordered him to surrender by kneeling down. He knelt down and they arrested him. The appellant was the one whom they found in possession of the weapons to wit one machete and four trapping wires and government trophies to wit two hind limbs fresh meat of wildebeest. He had no permit to possess the weapons, government trophies and to be in the national park. PW1 filled a certificate of seizure that was admitted in the court as exhibit P1. They took the accused person to Gibosa police station where they lodged their complaint against the accused person. At the police station they were received by WP 9755 DC Emmaculatha (PW4) a police officer. They informed

her of what had transpired in the National Park that led them to arrest the appellant.

PW4 after taking the statements of PW1 and PW3 she opened a police case report with reference: GIB/IR/63/2021 and label exhibits with GIB/IR/7/2020. The weapons were later admitted in court as exhibit P4. Njonga William (PW2) was called at the police station to identify the Government trophy and prepared a trophy valuation certificate that was later admitted in court as exhibit P.2. After filling inventory form, he took the trophy before a Magistrate so as to file an inventory form and for the court to issue a disposal order. He alleges that the appellant was present when the disposal order was made, appellant was interrogated by the Magistrate who denied to be found with government trophy and he signed it by affixing his thumb print.

On the other hand, the appellant fended for himself by testifying that on the material date he had gone to his farm and find cattle in his farm whom was led by police officer to enter into his farm. He removed the cattle that is when police officers arrested him and put him into their car and sent him to police Tarime and then to court. He denied to have been found with weapons and Government trophies as alleged.

The trial court heard the matter and upon satisfaction, the appellant was dully convicted and sentenced as follows; In respect of the second count the appellant was sentenced to pay fine of Ths. 200,000/= and in case of default to serve one year imprisonment and on the third count to serve twenty years imprisonment. He was acquitted on the first count.

The appellant was aggrieved by the decision and orders of the trial court hence he filed an appeal before this court consisting of five grounds of appeal. The grounds of appeal in verbatim are to the effect that;

1. *That, the trial learned Magistrate grossly erred in law and fact to convict and sentence the appellant as no anyone who witnessed the signing of certificate of seizure (Exhibit Pl) immediately after the arrest of appellant on 9th, August, 2021, and no any independent witness who corroborated the evidence of Prosecution witnesses who are working at the same station, therefore their evidence create a lot of doubts as they enacted it to found conviction and sentence against the appellant.*
2. *That, PW3 who claimed to have identified and evaluate government trophies, his qualification as expert in trophy valuation was not disclosed, so the exhibit (P2) which tendered and admitted in prosecution's evidence was invalid in the eye of the law.*
3. *That, the Prosecution side enacted the exhibit P2 and impart it to the appellant at Kenyangaga Camp claiming that PW1 and his fellow arrested the appellant with that exhibit (Government Trophies) within*

the national Park, while that was shack and false evidence which lacked credibility and coherent to prove the allegation against the appellant whose arrest was effected in his farm outside the National Park .

4. *That, the trial Magistrate erred in law and fact for not giving weight and consideration the defense adduced by the appellant, basically what he advocated was credible and sufficient for the trial Magistrate to rule out in favor of him but the trial Magistrate denied completely to give consideration and weight to his strong defense.*
5. *That, the case against the appellant was not proved beyond all reasonable doubt as the appellant was arraigned and charged under non-existent offence of unlawful Entry into the National Park contrary' to section 21(1), (a) (2) and 29 (1) of the National Parks Act [Cap 282 R.E 2002] since this offence and other two counts which are unlawful possession of weapons into the National Park and unlawful possession of government trophies depends on each other which are mutatis mutandis for them to be committed.*

This appeal was heard by way of teleconference whereas the appellant was live linked from Tarime prison while the respondent who had the legal services of Ms. Natujwa Bakari, learned State Attorney was in court.

The appellant had a very short submission where he asked the court to adopt his grounds of appeal which was previously filed as part of his submission.

Replying, Ms. Natujwa learned State Attorney starting with the first ground of appeal submitted that, the certificate of seizure which is Exh. P1was signed by three people, that means, according to her there were witnesses. She further submitted that appellant was arrested under emergency and that section 106 (1) of the **Wild Life Conversation Act** (WCA) allow emergency seizure and at that state independent witness is not an option. It was her submission that the issue that Exh P1 was not signed by witnesses is about authenticity which was supposed to be verified in court during trial but appellant did not as the arrest officer testified in court but he did not ask any question and that appellant cannot raise it at this stage. Further to that she submitted that the trial court consider the evidence of other witnesses just as in the case of **George Lazaro Ogur vs. Republic** Criminal Appeal No. 69 of 2020 and pray this court to find the ground lacks merit.

On the second ground she submitted that it was PW2 who conducted the valuation of the Government trophy who has a degree of Wildlife Management Science from Sokoine University and he was working as Wildlife Officer just as required by law under section 86(4) of the **Wild Life Conversation Act.** She said the valuation certificate is premafacie

evidence of the matter stated therein. She referred this court to the case of **Emmanuel Lyabonga vs. Republic,** Criminal Appeal No. 257 of 2019where CAT analyzed qualification of an officer who conducted valuation. She prayed this court not to consider this ground because he did not object when valuation certificate was tendered and admitted and referred this court to the case of **Nyerere Nyague vs. Republic,** Criminal Appeal No. 67 of 2010 CAT at Arusha.

Regarding the third ground of appeal, the appellant's complaint was that he was arrested while in his farm and did not recognized Exh P2. State attorney noted that appellant was complaining of exhibit P1 which was the certificate of seizure. She resisted this ground of appeal and submitted that the appellant was found in possession of the Government trophy and weapons and that he was taken to the Magistrate for disposal order. She submitted that the chain of custody was intact and proved that he was found in possession and pray this ground to be found lacks merit.

As regards to the fourth ground of appeal, the learned state attorney refuted this ground as baseless. So long as the appellant has not shown how his evidence was not considered whereas the judgment is clear on how the appellant is implicated with the charge as found at pages 5 and

6. She said Hon. Magistrate weigh the evidence and concluded at page 8 and therefore the allegation on this ground of appeal as argued barely is baseless.

On the fifth ground of appeal, the learned State Attorney objected this ground by submitting that the prosecution's testimony / evidence was water tight and thus conviction and sentence were justified as per the law. She submitted further that under section 100 (3) of WCA the accused had a responsibility to prove to the balance of probability.

When the appellant was invited to make a rejoinder submission, he just reiterated his grounds of appeal as he had submitted earlier and prayed that this court determine this appeal in his favour.

Having considered the submissions of the parties and the evidence on record, the issue to be determined by this court is whether this appeal is meritorious.

Starting with the fourth ground of appeal, the appellant's concern is that the trial Magistrate failed to evaluate the evidence of the case. I have gone through the court's record particularly the judgement of the trial court and from page 6 of the typed judgment the trial Magistrate

evaluated the evidence in relation to the offence levelled against the appellant and came up with the conclusion that all offences were dully established. I am in agreement with the learned state attorney that the evidence was clearly evaluated and in that regard this ground of appeal is devoid of merits.

On the second ground of appeal about qualification of PW2 (the valuer) I have gone through the court's record and I find the qualification was indicated just as submitted by the state Attorney that PW2 has degree in Wildlife Science from the recognized University and that section 86 (4) of the **Wild Life Conversation Act** was adhered to. It is settled law that the trial court's finding on the credibility of a witness is binding on the appellate court. See **Bakiri Saidi Mahuru vs. The Republic,** Criminal Appeal No. 107 of 2021. Also, in the case of **Goodluck Kyando vs. Republic** (1996) TLR 263, it was held that every witness is entitled to credence. Unless there are good and cogent reasons for not believing him. I find this ground is also devoid of any merit and it is dismissed.

On the first ground of appeal, the appellant's concern is that there were no independent witnesses during his arrest. According to the court's record, the incidence occurred in the National Park and he was arrested

by conservation officers. It is a settled law that an independent witness is required when an appellant is arrested in a dwelling place. In the case at hand the appellant was not in a dwelling place and the witnesses who arrested him were competent as per law (section 127 and 61 of the Tanzania Evidence Act, Cap 6 R. E. 2019). There is no known law that a park ranger is prohibited from testifying on account of what he is knowledgeable even if in the course of performance of his duties. Therefore, it is my humble view that this ground is also devoid of merits and it is dismissed.

Lastly, this court will discuss the third and the fifth ground of appeal together. The appellant's grief on this is that, the trial court has not proved its case beyond reasonable doubt. In criminal cases, the burden of proof always lies on the prosecution to prove the case beyond reasonable doubt section 3(2) (a) of the Evidence Act, [Cap 6, R. E. 2022]. This burden never shifts.

Regarding the second count of unlawful possession of weapons in the National Park, reading the trial court record prosecution informed the trial court that they found appellant along Korongo la Matoro but they did not provide GPS over its location. What I find is that appellant cross examined

PW1 about the weapons. I read between the line the first schedule of cap NPA I did not find if the said Korongo la Matoro is among the areas form Serengeti National Park. Failure to provide GPS or coordinates then I find prosecution failed to prove this offence against the appellant.

In relation to the third count; on unlawful possession of Government trophies, I have a different view. PW2 testified how he went to the court on 11/08/2021 to take an inventory form before a Magistrate for disposal orders and that the accused person is reported to have been present and was interrogated. The said inventory form was admitted and marked as Exhibit P.3. I have gone through this exhibit P.3, there is a thumb print of the accused person. That could be held as if it is sufficient to state that the appellant was present. However, that is not the only legal requirement to be met so that the disposal order to be issued. There is nowhere as per suggestion in the inventory showing that the appellant was heard as per paragraph 25 of the Police General Orders. This provision requires, among others, the accused person to be presented before the Magistrate who may issue the disposal order of exhibit which cannot easily be preserved until the case is heard. It provides: -

'Perishable exhibits which cannot easily be preserved until the case is heard, shall be brought before the Magistrate, together with the prisoner if any so that the Magistrate may note the exhibits and order immediate disposal. Where possible, such exhibits should be photographed before disposal.'

The law is settled the accused must be heard as well. See **Mohamed Juma @ Mpakama vs. Republic,** Criminal Appeal no. 385 of 2017, CAT (unreported), where it was held that: -

'While the police investigator, Detective Corporal Saimon (PW4), was fully entitled to seek the disposal order from the primary court magistrate, the resulting Inventory Form (exhibit PE3) cannot be proved against the appellant because ***he was not given the opportunity to be heard by the Primary court Magistrate.'*** *(Emphasize supplied).*

For avoidance of doubt, such an application must be done formerly and the records must explicitly state so. In the absence of clear Court's order on that the procedure is flawed. Having stated the above, it is safe to state that the third count was not proved beyond reasonable doubt and therefore the 3rd and 5th grounds of appeal have merit.

All said and done, I find the whole appeal has merit. I hereby allow it, quash the conviction and set aside the sentence. The appellant **NDAGU NYAMHANGA ROBARE** to be released from prison unless lawfully held.

DATED at **MUSOMA** this 26th Day of June, 2023

M. L. KOMBA

Judge

Judgement delivered in chamber while the appellant was connected from Tarime prison and in the absence of State Attorney.

M. L. KOMBA

Judge

26 June, 2023