

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MUSOMA SUB REGISTRY

AT MUSOMA

CRIMINAL APPEAL NO 04 OF 2023

(Arising from Economic Case No.24 of 2022, of the District Court of Tarime at Tarime)

JOSEPH NYAMHANGA NYAGICHONGEAPPELLANT

VERSUS

REPUBLIC..... RESPONDENT

JUDGMENT

9th May & 14th July 2023

F. H. Mahimbali, J.

The appellant in this case was sentenced by the trial court to serve two years and twenty years for the second, third and fourth counts respectively after being dully convicted with the three offences charged: *unlawful possession of weapons and unlawful possession of government trophies into the Serengeti National Park (two counts).*

It was alleged by the prosecution that on 9th day of July 2022 at Tindigani area into Serengeti National Park within Tarime District in Mara region, the appellant was found unlawfully within the National Park as he had no any permit authorizing his entry therein and that was also found unlawfully being in possession of weapons to wit: one knife knife,

two animal trapping wires in which he failed to account the intended use other than hunting, killing, wounding or capturing of wild animals. Thus, the basis of being charged with the three offences contrary to section 21(1)(a), (2) and 29(1) of the National Parks Act (Cap 282 R.E 2002) for the first count, section 24(1),(b) and (2) of the National Parks Act (Cap 282 R.E 2002) for the second count and 86(1) and (2) (c)iii of the Wildlife Conservation Act, Cap 283 R.E 2022 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 2022 for the third count.

The appellant pleaded not guilty to all charged three counts which then necessitated prosecution to summon a total of four prosecution witnesses and tendered four exhibits (P1=valuation and certification report, P3=inventory form of the alleged trophy, P2= disposition order of the said trophy, P4= the alleged weapon, P5= search and seizure certificate).

In their testimonies, PW1 and PW4 who are Park rangers testified how on the 9th July 2022 while in their normal patrol duties at Tindigani area which is within Serengeti National Park, met the accused being unlawfully present within the said park without any permit authorizing

his entry there in. Together with him, he was in possession of one knife, and two animal trapping wires in which he failed to account the intended use other than hunting, killing, wounding or capturing of wild animals, one fore limb of topi fresh meat. When they interrogated about his lawfulness in possession, he had nothing to reply. He mentioned his name being Joseph Nyamhanga Nyagichonge of Karakatonga village of Tarime district. They arrested and seized all the weapons and the said trophy (P5 and P4 exhibits) and sent him to police Nyamwaga where the report of his arrest and possession of the alleged weapons and trophy was reported (NY/IR/1592/2022).

PW2 when asked to identify the said government trophy (exhibit P1), was able to tell the court as government trophy (fore limb of topi animal) because of the unique features it possessed: fore limb had black dots and it was flat and the hind limb has round bone. The statutory value of the said animal is 1,862,000 (Exhibit P1).

Lastly, PW3 told the trial court on 9th day of July 2022 at evening hours while at CRO – Nyamwaga police station, he saw TANAPA officers being with the accused person who had arrested him being unlawfully within Serengeti National Park and that had been in possession of government trophy (topi) and weapons (knife and trapping wires). They

opened police case file with **ref no. NY/IR/1592/2022**. He then put the appellant into the cells and the said exhibits (P1 and P4) into the exhibit room.

In his defense testimony, the appellant denied being arrested within Serengeti National Park being in possession with the alleged weapons and trophies but at his farm and the game officers unlawfully connected him with this charge by collecting these weapons and the alleged trophy against him. He prayed for the trial court to do justice to him.

Upon digest of the evidence of the case, the trial magistrate acquitted the accused person on the first count of being unlawfully within the Serengeti National Park as it is unestablished offence as per current law. Nevertheless, she convicted him in the remaining two offences (2nd, and 3rd counts) and consequently sentenced him as stated above.

Undaunted, the appellant has opted this appeal challenging the findings of the trial court on five grounds of appeal, namely:

- 1. That the trial magistrate erred in convicting him as the prosecution evidence was marred with doubts affecting the root of the prosecution case.*

- 2. That the trial magistrate erred in convicting and sentencing the appellant in the absence of strong established connected chain custody of the prosecution exhibits which then affected the proof of the case beyond reasonable doubt.*
- 3. That the trial magistrate erred in failure to consider and analyze the appellant's defense.*
- 4. That there was improper admission of prosecution exhibits despite the raised objections on their admissibility.*
- 5. That during the disposition of the alleged trophies, the appellant was not involved.*
- 6. That the prosecution's case was not established beyond reasonable doubt as per law.*

During the hearing of appeal, the appellant was represented by Mr. Onyango learned counsel whereas the respondent who resisted the appeal was represented by Ms Agma Haule, learned state attorney.

In arguing the grounds of appeal, Mr Onyango while starting with ground 5 of the petition of appeal was of the submission that the alleged trophy has not been clearly stated whether it is fore limb or hind limb for it to implicate the appellant. The charge, evidence on one hand and the matters in dispute seem to be at variance. To him this was a sufficient inconsistency in law. He drew support from the decision of the case of **Mohamed Said Mohamed** (1995) TLR 10.

On the first ground of appeal, he faulted the trial magistrate for failure to find reasonable doubt over the scene of crime. Is it plain area,

open bush or ditch? To him the point of arrest is not clear. He then considered it as a serious inconsistency which affected the quality of the prosecution's case.

On the third ground of appeal, he faulted the trial magistrate by not according any weight the defense testimony in her judgment. Whereas the arresting officers – PW1 and PW4 talk of Tindigani area within Serengeti National Park, the appellant talk being arrested at his farm. Unfortunately, the trial magistrate did not tell anything on that variance story. Mr. Onyango considered this as marring illegalities of the judgment thus affecting the justice of the case.

Lastly, he attacked the prosecution's evidence on the issue of chain custody of the said trophy (exhibit P1 and 4). That there was no evidence by prosecution stating how the said exhibit moved/exchanged hand from one officer to another. The proceedings are silent even how the said exhibits when tendered in court today, originated from what office. Mr. Onyango contended that though the principle of strict compliance to chain of custody as stated in the case of Paulo Maduka is now relaxed, yet crucial matters were retained for purposes of telling how the said exhibits were handled. On this, he drew attention of the court in the case of **Jasson Paschal and Another vs. Republic,**

Criminal Appeal No. 615 of 2020, CAT at Bk which relaxed some principles of strict compliance set in the case of **Paulo Maduka** especially on physical exhibits. As the proceedings on the manner of handling physical exhibits in this case are silent, he prayed that this court to declare the prosecution's court as not dully established.

In a total consideration of his submission, Mr. Onyango contended that the prosecution's case as weak against the appellant, thus the appeal be allowed, conviction be quashed and the meted out sentence be set aside.

Ms Agma Haule learned state attorney who resisted the appeal, started her submission with the third ground of appeal arguing that it is not true that the defense testimony was not considered as argued. On this, she made reference to page 8 of the judgment of the trial court. Furthermore, she submitted that since the appellant gave unsworn testimony in his defense, in law it carried no weight pursuant to section 198(1) of the CPA. The only exception accorded by law for a witness to give his testimony without being sworn is as provided under section 127(2) of the Evidence Act, Cap 6 R.E 2022. Since the appellant's testimony at the trial court was not evidence as per law, it could not be accorded any weight it ought to have been. She invited this court to

have a look in the case of **Amosi Selemeni V. Republic**, Criminal Appeal No. 167 of 2015, CAT at Dom.

The 2nd and 4th grounds of appeal she argued them jointly on the issue of chain of custody, rebutting that as per her considered view, what PW1 and PW4 testified significantly stated how they dealt with the said trophy. Similarly, is the testimony of PW2 who went for identification and valuation, he was given trophy with ref no. NY/IR/1592/2022 which reference number is identical to what is stated by PW5, the exhibit keeper. In line with the decision of the Court of Appeal in the case of **Kadiria Said Kimaro Vs. Republic**, Criminal Appeal No. 301 of 2017, the issue of chain custody was also well dealt contended Ms. Agma Haule.

On the fifth ground of appeal, Ms Agma admitted that reading the facts of the case (as stated at PH) and the evidence of the case (PW1 and PW4), it is clear that there is a variance on the description of the alleged trophy. Whereas at PH, amongst matters in dispute was the hind limb of topi and not forelimb. However, the charge and the prosecution's evidence talk of forelimb. That notwithstanding, she considered the inconsistency as not affecting the root of the case, thus curable under section 388 of the CPA. On the cited authority by Mr. Onyango

(Mohamedi Saidi Matula), she admitted with the principle set there in, however, she argued that, objectively the said authority favors the republic as per situation at hand.

With the first ground of appeal regarding there being doubts against the prosecution's case on the description of point of arrest, she considered it as being of no significance in consideration that, the place could have both features: korongo and thick bush. Therefore, it was not a material doubt unless there was evidence that the place had only thick bush without korongo and or otherwise.

In summing up her submissions, she considered the prosecution's case as strong and its evidence incriminating. On this, she prayed that the appeal is devoid of any merit and is bound to be dismissed in its entirety.

On his rejoinder submission, Mr. Onyango reiterated his submission in chief and emphasized that it is undoubted that there is variance between evidence and the particulars of the charge as per facts being disputed. And that the issue of chain of custody, none-consideration of defense testimony all these are significant issues worth of consideration by this court. He prayed that the appeal be allowed as

prayed. Conviction be quashed, sentence set aside and the appellant be set at liberty.

I have dispassionately digested the prosecution's evidence at the trial court as summarized above. I have equally gone through the trial court's judgment on which the findings on conviction and sentence are based. Significantly, I have deeply condensed the learned counsel arguments for and against the appeal.

To start with, so long as there was no proof that at the point the appellant was arrested was within Serengeti National Park, the offence of being in unlawful possession of weapons within Serengeti National Park cannot stand as the two are inseparable. To consider otherwise, is to convict the appellant on weakness of his defense which is not the position of our law (see **Simon Kilowoko V. Republic** (1984) TLR 34). That an accused person is only convicted on the strength of the prosecution's evidence and not otherwise. That said, there is merit in ground no.4 of the petition of appeal if you read it together with ground no1 and 2. The offence of being in unlawful possession of weapons within the National Park goes together with establishing the fact of being present within the said National Park which is only established by stating the coordinate points of the alleged point of arrest whether is

within the geographical boundaries of the said Serengeti National Park (See **Dogo Marwa @ Sigana and Mwita Baiton @ Mwita vs Republic**, Criminal Appeal no 512. Of 2019). That said, the merits of this ground of appeal makes conviction and sentence on the second count unmaintainable and it is hereby quashed and set aside.

Regarding the offence in the third count the important question to consider is whether the appellant's conviction and subsequent sentencing is merited as per law. I am aware that such an offence is convicted regardless the point of arrest. Provided it is sufficiently established that it is government trophy, its possession is always unlawful unless one has an authorized permit as per law (See section 86(1) of the WCA, Cap 283 R.E 2022).

In consideration to the testimony of PW1 & PW4 on one hand and PW2 & PW3 on another, it is suggesting that the appellant was found being in unlawful possession of government trophy – topi and the and that the said trophies belonged to zebra and wildebeest animals. The manner PW3 described the features of the said trophies were not shaken by the defense (appellant). The law is settled that in our jurisdiction that every witness is entitled to credence and must be believed and his/her testimony accepted unless there are good and

cogent reasons for not believing a witness. In the case of **Mathias Bundala vs Republic** , Criminal appeal No. 62 of 2004 CAT at Mwanza where it approved the case of **Goodluck Kyando vs Republic** (2006) TLR 363, the court held that:

" It is trite law that every witness is entitled to credence and must be believed and his testimony accepted unless they are good and cogent reasons for not believing a witness".

In the current case, I have not been able to establish any incredence in the prosecution's evidence against the appellant. As of that, I must firmly believe that what they testified is nothing but truthful in the absence of that incredence or holding doubt on the aspect of unlawful possession of government trophy.

The above notwithstanding, throughout the trial, I have not encountered any reasonable question against the prosecution's evidence which would have shaken the prosecution's case. It is a principle of evidence established upon prudence in this jurisdiction that failure to cross examine a witness on important matter means acceptance of the truth of the witness evidence - see: **Damian Ruhele v. Republic**, Criminal Appeal No. 501 of 2007 (unreported), **Nyerere Nyague v.**

Republic, Criminal Appeal No. 67 of 2010 and **George Maili Kemboge v. Republic**, Criminal Appeal No. 327 of 2013.

In a further analysis of the prosecution's evidence especially via PW2 as reflected at page 26 of the typed proceedings, it is not vividly clear that if the said alleged trophy was really found with him. The evidence says;

"The meat was fresh the said things were close t where the accuse stood. The said luggage was one fore limb of topi"

To me, a mere fact that the said cargo was close to him, does not necessarily mean possession as per law. There ought to have been clear evidence of the fact of possession and not a fact of closeness. This evidence then is materially contradictory to PW1's evidence who testified that they arrested the appellant being in possession of the alleged trophy (see page 13 of the typed proceedings).


Where there is material inconsistency of the prosecution's evidence, it raises material doubt which in law is sufficient to benefit the accused person.

That said, appeal is allowed, conviction and sentence meted out are hereby quashed and set aside.

The appellant is hereby ordered to be released forthwith, unless lawfully held by other causes.

DATED at MUSOMA this 14th day of July, 2023.




F.H. Mahimbali
Judge

Court: Judgment delivered today the 14th of July, 2023 in the presence of the appellant and respondent being in person and Mr. K.S. Rutalemwa, RMA, present in Chamber Court.

Right to further appeal explained.


F. L. Moshi,
Deputy Registrar