

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA
AT SHINYANGA**

CRIMINAL APPEAL No. 105 OF 2022

*(Arising from Economic Case No. 47 of 2021 of the District Court of Bariadi
at Bariadi)*

SUBI MASUNGA..... APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

23th March & 9th June, 2023

MASSAM, J:

The appellant together with Sunga Gita who in trial jumped bail and the court proceeded in his absent, in trial court were both charged with threecounts. On the first count, they were charged with Unlawful Entry into the Game Reserve contrary to section 15 (1) and (2) of the Wildlife Conservation Act No. 5 of 2009, the second count was Unlawful Possession of Weapon in Game Reserve contrary to 17 (1) and (2) of the Wildlife Conservation Act No. 05 of 2009 read together with paragraph 14 of the first Schedule and section 57 (1), 60 (2) of the Economic and Organized

Crimes Control Act (Cap 200 R:E 2019). the third count was unlawful possession of Government Trophies c/s 86(1) and (2)(b) of the Wildlife conservation Act no 5 of 2009 read together with paragraph 14 of the first Schedule to and Sections 57 (1) and Section (60)(2) of the Economic and Organized Crime Control Act Cap 200 R.E 2019.

The historical back ground of this appeal as found in the records are that on 9th October, 2021 the Conservation Rangers one Aristarik Prosper Swai (PW1) and Joshua Hosea Mahanya (PW3) together with other persons ones Deus Sambaja and Kalyango Charles were on routine patrol at Mama Ntilie which is said to be within the boundaries of Maswa Game Reserve. It is alleged that on the course of the patrol, they heard a sound of motorcycle, they hide themselves so that they can see the said motorcycle. When accused came close to them, they managed to arrest the two accused persons Subi Masunga and Sunga Gita the said accused persons were in possession of a motorcycle, carcass of Zebra and two knives.They interrogated the accused persons, no one had a legal permit to enter into the National Park and to own the Government Trophies and weapons inside the National Park. It was also alleged that after the arrest the said

Conservation Rangers seized the Government trophies, knives and the motorcycle.

From there, they took the accused persons to Bariadi police station and handed over the exhibits. After some preliminary investigation of the crime which included the assessment of the value of the said trophies by the District wildlife Officer one David Remiquis Ishengoma (PW4), assessed the said Trophies at USD at 1200 which is equal to Tsh. 2,766,000/= accused were arraigned to Bariadi District court where they were charged with the aforesaid offenses. They disputed to have committed the offence and when they were put on the defence, maintained the denial to have been found neither in the Game Reserve nor in possession of the Government trophies and the weapons mentioned in the charge. Appellant narrated that he was arrested at his home and was taken to Bariadi Police Station. He said he was a fight with one Pasion. He denied the fact that him with his fellows, were riding the motorcycle make King Lion without any written legal permit from the National Park Authority to enter into the mentioned Game Reserve. After a full trial appellant was convicted and accordingly sentenced. On the 1st counts the appellant with his fellows were sentenced to serve one year Imprisonment, the second count both

accused were sentenced to serve one year Imprisonment and the last count were punished to serve 20 years in Imprisonment.

Dissatisfied, appellant lodged a Petition of appeal with four grounds of appeal which reads; -

- 1. That the Trial magistrate erred in both law and in fact when he failed to consider that the prosecution side failed to prove the case beyond reasonable doubt.*
- 2. That the learned trial magistrate erred in law to hold the conviction in insufficient evidence adduced by the public witnesses because I was not arrested at the scene of crime.*
- 3. That, the learned trial magistrate erred in law and in fact to pass a sentence without calling the independent witness who witnessed the search to attend in court to testify the same.*
- 4. That, the case was not proved to the standard required in the eyes of law hence it left the shadow of doubts that I committed the said offence.*

At the hearing of this appeal, appellant appeared in person without any legal representation, while the Respondent was under the representation of Glory Ndoni learned State Attorney. When invited to

submit in support of his appeal, appellant had few words to submit, he said the trial court did not do him justice. He prayed this court to consider his grounds of appeal and set him free.

Ms. Glory Ndoni noted the court that she is not in support of the appeal but she supported the conviction and sentence. Before started to submit, Ms. Glory prayed the court to consolidate the grounds 1,2 and 4 to be argued jointly as all challenges the issue of evidence which brought by prosecution was not proved beyond reasonable doubt, and the ground 3 to be argued separately. She submitted that the prosecution in trial court proved the case in all counts of Unlawful entry in the Game Reserve, unlawful possession of weapons and unlawful Possession of Government Trophies.

Ms. Glory started with the 1st count that the it is a law that in order for a person to enter to the Game Reserve, he must have permit for so doing, she argued that in trial court they proved the said count by evidence of PW1 and PW3 who testified that on 9/10/2021 they were at patrol at Maswa Game Reserve, they stopped the two riding motorcycle which carrying the appellant with his fellows in possession with the carcass of Zebra and two knives. After they arrested, they noticed accused persons

had no permit to enter in the Game Reserve. She added by stating that the evidence of PW1 and PW3 was not shaken in any way, so it was proved that appellant entered the Game Reserve without permit.

She went on arguing the 2nd count of Unlawful possession of weapons in a Game reserve, she said PW1 and PW2 did prove the charge as testified that after they arrested the appellant, they found them with two knives and PW1 did tendered certificate of seizure as exhibit P1 and the knives exhibit P3. She said also their evidence was not shaken but proved that appellant found with no permit and as per section 17 (1) and (2) of the Wildlife Conservation Act No. 5 of 2009 in 3rd count, unlawful possession of Government Trophy. She submitted that PW1 and PW3 found the appellant at Maswa Game Reserve in possession of Government Trophy that carcass of zebra without permit from the Director of Wildlife. The said trophy was identified and evaluated on 11/10/2021 by PW4 who disclosed that the said skin was equivalent to Tsh. 2,766,000/= and tendered as exhibit P5 to prove the value of the trophy. With thus, she said that the prosecution brought strong evidence to prove the said count.

On ground that the prosecution failed to call independent witness, she argued that, in this case PW1 told the trial court that the area was far

from the nearby Village area, therefore could not be easy to find independent witness. She said in that similar issue, was discussed in the case of **Tongora Wambura vs the DPP** Criminal Appeal No. 6 of 2006 where on page 6 the court said that it depends on the particular circumstances of each case, also absence of such people per se did not render the operation illegal or the prosecution case fatal. Coming to our issue on hand, she notified the court that it was geographical factor caused the absence of such people (independent witness) as the area was not nearby Village area. She referred the court to look on the provision of Section 106 (1) (b) of the Wildlife Conservation Act. Which show powers of search and arrest gave no requirement of independent witness and if needed in case when the search was conducted in dwelling house. She said in the case at hand the search was conducted in the Game Reserve so the absence of independent witness could not make a search illegal. She thus said the ground has no merit rather the prosecution proved the case.

In his rejoinder, appellant reminded the court to receive his grounds of appeal to be a part of his submission.

Having carefully read the trial court records, grounds of appeal together with both parties' submissions. My major task now is to determine **whether the appeal before this court has merit.**

In this matter as per facts dictation, appellant tries to challenge the charge against him that on the material date and time him together with one Sunga Gita they were arrested for unlawful entry the Game Reserve without legal permit, found in possession of Government Trophy and weapons. At the appeal appellant challenged that the trial court convicted him with insufficient evidence to prove that appellant committed the alleged offence. In the side of prosecution side the learned State Attorney submitted in length that, the prosecution proved the charge as per evidence of PW1 and PW3 who said they gave direct evidence that they found the appellant with his fellow in the Game Reserve without a legal permit from the Director of National Parks. Ms. Glory Ndoni S/A argued that PW1 and PW3 in particular testified that on 9/10/2021 at about 18:00 were in patrol at Mama Ntilie in Maswa Game Reserve they heard a sound of motorcycle which was coming near them, they arrested two persons whom they suspected, those persons (appellant and his fellow) with motorcycle had in possession of a carcass of Zebra and two knives. Upon

arrested, they failed to produce the entrance permit. They filed the certificate of seizure and took the suspects to Bariadi Police Station then opened the file with No BAR/IR/1933/2021 the seized items the motorcycle and the seized exhibits said to be taken to store keeper. They further informed the trial court that the exhibits which were handed to Police are motorcycle with no plate number but its Chassis No. 162FMJ*19J06188* and the knives had a rubber handle and plastic handle. The said items were tendered in court as exhibits P2 and P3.

Again, it is in trial record that after the exhibits were handled to Police station and after PW1 and PW3 filed the Complaint file No. BAR/IR/1933/2021 PW2 535 D/Cpl Bwire on 12/10/2021 morning hours he found the aforesaid filed with the offence of possession of Government Trophies. He testified that he called a Wildlife Officer PW4 who proceeded to evaluate the said carcass of Zebra.

Remiquis Ishengoma, a Wildlife Officer of Maswa Game Reserve (PW4) after being called and identified the two pieces of carcass of Zebra and he evaluated the same he said he discovered that both of them had valued at USD 1200 which was equivalent to TZS 2,766,000/= he issued a trophy valuation certificate (Exhibit P4).

Basing on the submissions from State attorney supporting the conviction and sentence I had have an ample time to re evaluation the evidence of the trial and under section 127 (1) of the evidence Act Cap 6, I find nothing to doubt the credibility of PW1 and PW3 that they arrested appellant at the purported Game Reserve of Maswa in possession of Carcass of Zebra and two knives and the same valued 2,766,000/= but after a thorough reading between the line to found out if the prosecution proved the 1st count that accused persons unlawful entered the Game Reserve. The prosecution witnesses proved to the effect that they arrested the accused persons at the Game Reserve they testified in a general statements that on 9/10/2021 at Mama Ntilie Maswa Game Reserve did arrest the accused persons the facts which the appellant on defence failed to disconnect from the alleged allegation, but taking into account that appellant in trial court denied to be arrested in the Game Reserves by fending that on 8/10/2021 he was arrested at his home after his door was knocked, he opened the door, Rangers took him to Bariadi Police Station.

It is my opinion that prosecution via witnesses had an opportunity to lead by evidence that the area the appellant with his fellow was within the Maswa Game Reserve. They failed to testify in detail to describe the

purported area with its boundaries between it and the neighboring villages that could prove that where appellant and his fellow were arrested within the de-marked area. I find so because by a mere word of the prosecution's witnesses that they arrested the accused persons at Mama Ntilie Maswa Game Reserve without thorough information to prove that appellant and his fellow entered into the prevented area, it is very difficult for this court to ascertain if the home of the appellant is within the Maswa Game Reserve taking the facts that most of the National Parks boundaries and the Villages are without clear identification to many Villagers in particular areas of National Parks vs. the Villages. The Court of Appeal citing at Shinyanga on 11/11/2022 dealt with the same facts in **Bahame Sita vs The Republic**, Criminal Appeal No. 166 of 2022 (unreported) the court directed that;

*"..Given the inter locking nature of some of the National Parks areas and the village lands in our country, together with a really nebulous idea among many people of what separates the two, and, **taking into account the appellants' defence versions that they were arrested in their farms, it was incumbent upon the***

prosecution]witnesses in the present case to lead evidence proving beyond doubt that, Ibilingwa Hill area where PW2 and PW4 allegedly arrested the appellants was within the Serengeti National Park area as specified in the First schedule to the National Parks Act. In the absence of such evidence, it was not open for the two courts below to hold as they did, that the appellants were arrested within the boundaries of Serengeti National Park while in possession of the alleged weapons.”

Subscribing with the authority above, I find that the 1st count of Unlawful entry into the Game Reserve was not proved to warrant the conviction.

Now the 2nd and 3rd count that accused persons were arrested with Unlawful Possession of Weapons in Game Reserve and Unlawful Possession of Government Trophies. In this issue as in the 1st count as the submission of the State attorney that on the mentioned date, place and time PW1 and PW3 arrested appellant in possession of the said Carcass of Zebra and two knives, after being arrested with the same, it is in the record that PW1 and PW3 seized them taken to Bariadi police station where they gave to Police

Officer, that fact has no doubt to me as the said witnesses proved the same, but in this regards after being read between the line of the testimonies of the said witnesses I found that the record is silent on who received the exhibits at the police station they failed to notified who they gave the exhibits at the Police and it is unknown after receipt , where they were kept and who was the exhibit keeper and the same how they reached at the court. What we see in the record is that PW2 on 12/10/2021 he received a file from OC-CID with No. BAR/IR/19933/2021, the said file had contained the Offence of being in possession of government trophies to wit, one Carcass Zebra, a Panga, two knives and one motorcycle Mark King Lion.He prepared a file and send it to the office of NPS, before he took that animal to the court for inventory order.

It is pertinent law that it is safe for the prosecution to establish and prove that the accused person's possession of the trophies to ensure that the movement of the trophies seized are the ones produced in court without tempered with. in the case of **Chacha Jeremiah Murimi and 3 others vs. The Republic**, Criminal Appeal No. 551 of 2015 (unreported) where it was held that:-

*'..in order to have a solid chain of custody it is important to follow carefully the **handling of what is seized from the suspect up to the time of laboratory analysis, until finally the exhibit seized is received in court as evidence.** There should be assurance that the exhibit seized from the suspect is the same which has been analyzed by the Chief Government Chemist. **The movement of the exhibit from one person to another should be handled with great care to eliminate any possibility that there may have been tampering of that exhibit...**'*

Nevertheless, at page 27 of the trial proceedings PW4 testified that he filled an inventory form to dispose the Government Trophies and send it to the court. The said inventory was admitted as exhibit 5, indeed it is in record. However, and again, the testimony of PW4 and the records are silent in suggesting that the appellant was presence when the said Government Trophies disposed, when testified on that issue, PW4did not testify that the appellant was present at the time of disposing of the government trophy, It is a requirement of law and the same was insisted by the Court of Appeal that at the time of disposing the exhibit which cannot be kept due to speed decay as the subject matter in course. It was

in **Mohamed Juma @ Mpakama vs Republic**, Criminal Appeal No. 385 of 2017, (unreported) where the court held that:

"While the police investigator, Detective Corporal Simon (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. In addition, no photographs of the perishable Government trophies were taken as directed by the PGO. Our conclusion on evident probity of exhibit PE3 ultimately coincides with that of the learned counsel for the respondent. Exhibits PE3 cannot be relied on to prove that the appellant was found in unlawful possession of Government trophies mentioned in the charge sheet."

Adhering to the above position in the line with the case in hand, it is clear that, the prosecution failed to prove if the seized exhibit complied the ingredients requirement of chain of custody without being tempered and the same the prosecution witness at the time he was disposing the exhibit

which is the subject matter failed to accord the guidance required by the law.

Hinted above, in a nutshell I may say I have no doubt that prosecution found the appellant in possession of government trophies and weapons which the same were handled to Bariadi Police Station, but I failed to approve the conviction as the chain of custody of the subject matter which alleged to be unlawful possession is in question. It is therefore the exhibits which were the subject matter in the trial court were uncertainty if were the same exhibits seized at the arresting point to the tendered point or if were tempered with or not. I take it that, the prosecution complained the uncertainty subject matter which the trial court grounded the conviction.

For the aforesaid reasons, the appeal is allowed. The conviction and sentence are quashed and set aside. Appellant be released from imprisonment unless held with lawful cause.

Ordered accordingly.

DATED at **SHINYANGA** this 9th day of June, 2023.



R.B. Massam
JUDGE
09/06/2026

Court: Right of appeal explained.

