IN THE HIGH COURT OF TANZANIA

MUSOMA DISTRICT REGISTRY

AT MUSOMA

CRIMINAL APPEAL NO. 17 OF 2022

(Originating From Economic Case No. 03 of 2018 of the District Court of Serengeti at Mugumu)

BETWEEN

KHAMIS S/O GAMAHO @ MARANYA ..... 1ST APPELLANT
HAMIS S/O MABULA @ NYANDA ..... 2ND APPELLANT
GIRIENA S/O BWANANA @ MONGU ..... 3RD APPELLANT
KASIMU S/O MUSA @ BUYA ..... 4TH APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

26th & 31 July, 2023

M. L. KOMBA, J.:

Appellants above named **KHAMIS GAMAHO @ MARANYA, HAMIS MABULA NYANDA@ NYANDA, GIRIENA BWANANA@ MONGU, KASIMU MUSA @BUYA** and **JUMANNE NYAGETI@SAMSONI** (who is not a party in this appeal) were arraigned before the District Court of Serengeti at Mugumu (the trial court) charged with six counts; **one,** unlawful entry into the National Park contrary to Sections 21(1) (a) and (2) and 29(1) of the National Parks Act, [Cap 282 R.E 2002] as amended by

the Written Laws (Miscellaneous Amendments) Act No. 11 of 2003 (the NPA).; **two**, unlawful possession of weapons in National Park to wit one fire arms make 458 Riffle with Registration No. 2404003, five rounds of ammunition for rifle (458), one axe, two knives, two files and one double edged knife (sime) without having permit contrary to section 24(1)(b) and (2) of the NPA.; and **three**, Unlawful killing of wild animals in the national Park to wit two elephants valued Tsh 64,800,000/= contrary to section 23(1) and (2) (a) of the NPA.; **four**, unlawful possession of Government trophies to wit four element tusks weigh 72.40 Kilograms valued 64,800,000/ contrary to section 86 (1) and (2)(b) of the Wildlife Conservation Act No. 05 of 2009 as amended by written Law (Miscellaneous Amendments) Act No. 2 of 2016 read together with Paragraph 14 of the First Schedule to, and sections 57 (1), 60 (2) of the Economic and Organized Crime Control Act [Cap. 200 R.E. 2002] (EOCCA).; **Five**, unlawful possession of fire arms contrary to section 20 (1) (a) and (2) of fire arms and Ammunition Control Act of 2015 read together with paragraph 31 of the first schedule to, and sections 57 (1) and 60(2) both of the (EOCCA).; **six**, unlawful possession of ammunition contrary to

Sections 21 (a) and 60(2) both of the (EOCCA). Offences are alleged to be committed on 2nd and 3rd January, 2018.

After full trial, Serengeti District Court, found the appellants guilty and proceeded to convict them with the 3rd, 4th 5th and the 6th counts and sentenced them on each count to serve imprisonment for 20 years, it ordered the sentence to run concurrently.

Aggrieved, **the appellants herein above** appealed to this Court with eight (8) grounds of appeal that;

1. That, since the offence of unlawful entry into the National Park and unlawful possession of weapons to wit one firearm, one axe, two knives and knife were not proved by the prosecution witnesses, the Appellants were wrongly implicated with the offence of unlawful killing of wild animal in the National Park, unlawful possession of Government trophies and unlawful possession of firearm and ammunitions.

2. That, the cautioned statement (Exhibit PE 10) of the first Appellant were wrongly taken and admitted in evidence.

3. That, the chain of custody of exhibits were not established and hence Exhibit PE 2 (four elephants tusks), Exhibit PE 5 (Axe, two knives) Exhibit PE3 (one firearm, Exhibit PE 4 (three ammunitions of Rifle) were wrongly received and admitted in evidence.

4. That, since carcasses of elephants were not produce in Court for disposal in presence of Appellants the Exhibit PE 7, two trophy valuation certificate cannot be of evidential value and the testimony of PW4 wildlife officer and PW5 D/Cpl Proches are not worth of belief.

5. That, search conducted at the 1st Appellant's house violated S.38(1) and S.38(3) of the Criminal Procedure Act [CAP. 20 RE 2019] and hence the Exhibit PE 1 and Exhibit PE 9 have no evidential value they should be expunged from the Court record.

6. That, failure for the prosecution to amend the charge to reflect the proper date on which the Appellants were alleged to enter into the National Park means all the counts in the charge sheet the Appellants were charged with was not proved.

7. That, the trial Court did not critically evaluate and consider the evidence of the defence and hence there were no fair trial to the Appellants.

8. That, the Examination Report from Ballestic Bureau (Exhibit PE 5) reflects only opinion rather than producing material facts which would induced PW3 to come to the conclusion he made so that the Court could form its own judgment and this affect credit worthiness of the testimony and prosecution case.

When the matter was scheduled for hearing, appellants were represented by Mr. Tuthuru, learned advocate while respondent, the Republic was

represented by Mr. Isihaka Ibrahim, Mr. Abdulkher Sadik and Ms. Natujwa Bakari all State Attorneys.

When given the floor, counsel for the appellants informed the court that he opted to drop ground number 5 and 8 of the petitions of appeal. He then submitted on the rest of ground. Mr. Tuthuru joined grounds 1 and 6 which were about the offence of carrying weapon in the National Park and unlawful killing animal while in National Park which were not proved.

It was his submission that at page 16 of the judgment, the Magistrate pointed contradiction on the date when appellant entered in National Park. He said there is variance on charge sheet and evidence on record and the charge was not amended till the case was finalized that means the offence was not proved as per charge sheet. To boost his argument, he cited the case of **Thabit Bakari vs. Republic**, Criminal Appeal No. 73/2019 CAT at DSM the court cited the case of **Abel Maskini vs. Republic,** Criminal Appeal No. 24/2015 to the effect that when there is variance then the charge sheet has to be amended in terms of S. 234 of CPA. If not done, the preferred charge remains unproved and the accused shall be entitled to an acquittal and he convinced this court that basing on the cited cases then, the offence charged the appellants remained unproved.

Elaborating further his argument, Mr. Tuthuru said the charge explain on 02/03/2018 the elephant was killed but none of the prosecution witness explained about 02/03/2018, the evidence on record explain they found appellants on 03/03/2018 with tusks.

In respect of the 7th ground about the evidence on defence, counsel for the appellant said all prosecution witnesses explain that search was conducted in the house of Hamis Gamaho who is the 1st appellant. In their defence, DW2 explained that 02/03/2018 he went to Rubanda to search for his missing child. Page 140 of the proceedings although the letter was not admitted he had a witness, Happy at page 150 of proceedings who confirm that she was the one who was looked for. Moreover, DW3 at page 142 explained he was arrested at the DW1 house when they were in the reconciliation of his matrimonial case together with his wife. From defence of appellants, it was his submission that appellants were engaged in constructive possession but not actual possession.

Counsel refers this court to the decision in **Ruben Razaro Mafuta and others vs. Republic**, Consolidated Criminal Appeal No. 503 of 2018, 240 of 2020 and 242 of 2020 CAT at Dodoma. Where the court said mere presence of other appellant when game officer conduct search or retrieve

tusks at the 4th appellant house does not amount others to be in possession, therefore according to him court musts invoke constructive possession theory. Moreover, there was no fair trial because accused were not given right to cross examine other witnesses, defence witnesses were not cross examined at page 138 where DW1 testified. More to other DW2, DW3 at page 142 and 145 respectively.

It was his submission that section 155 of the Evidence Act has not observed and he boosted his argument with the case of **Albanus Aloyce & Marco Ibrahim vs. Republic,** Criminal Appeal No. 283 f 2015 CAT at Arusha at page 6 as it was commented that after each testimony of accused the fellow accused were not cross examined and this may cause injustice. Refering the case at hand Mr. Tuthuru submitted that appellant was denied their right on fair trial as the right were enshrined for the purpose.

On the 2nd ground about caution statement, Exh PE10, it was his submission that it was wrongly prepared. He said, at the end of it, the conditions stipulated under section 57(4) of the Criminal Procedure Act, Cap 20 (the CPA) was not adhered as there was no certificate of both, the recording officers and the accused. Due to that non-compliance, he said

the caution statement has no evidential value and must be expunged from court record as was decided in the case of **Chamuriho Kirenge @ Chamuriho Julius vs Republic** (Criminal Appeal 597 of 2017) [2022] TZCA 98 (7 March 2022) that reading over the document to accused is mandatory. Provision of the law must be fully complied by prosecution. In the appeal which he was arguing, he said the exhibit does not reveal whether it was read over to the accused. He further submitted that exhibit PE10 was not recorded in line with requirements of law. S. 57 (2) of CPA need the accused to be informed of his offence but the exhibit is silent as there are some areas which was not filled.

Mr. Tuthuru notified this court that, Although the exhibit was not objected, this court is vested with power to verify the legality of the document submitted. If found it was illegal then he prayed it be expunged and that will result all the accused to be found with no offence committed. He prayed the appeal to be found with merit.

Resisting the appeal Mr. Isihaka (SA) on 1st and 6th grounds argue that, The offence of unlawful entry, possession of weapon and killing of animals are different offences and therefore if one was not proved does not amount that others should be considered that they were not proved. The

offence of unlawful killing whether in National Park or anywhere without permit is an offence and the unlawful killing not necessary to be done by weapon.

He submitted that, appellants have no permit to own weapons and ammunitions although some offences were not proved. It was his submission that all exhibits were admitted without objection and even cross examination it did not shake the exhibits and even defence of appellants did not shake the exhibits. Prosecution witness were not shaken by appellants during cross examination. The witness is believed that the fact is correct as in the case of **Nyerere Nyague vs. Republic**, Criminal Appeal No. 67 of 2010 CAT at Arusha at page 5 and 6 of judgment. The evidence of DW5 corroborated the prosecution case and there are precedents that when defence testimony corroborates or supports prosecution then prosecution case needs to be proved.

It was his submission that the issue of amendment of charge is non-merit as the area which charge was not amended the accused was acquitted but the rest of offences which they were convicted there was no variance and the conviction was proper. Elaborating further, Mr. Isihaka said on 4th count the particular of offence mention the date to be 03/03/2018 and

PW1 explain and give his testimony about 03/03/2018 and even the testimony of DW5 who was called by DW1 testified on 3/3/2018. He resisted that the offence which the appellants convicted were proved and therefore the case of **Thabit Bakari vs. Republic** (supra) is distinguishable as there is no variance to the offence which the appellants were convicted.

In respect of the 7th ground the defence was considered and there was a fair trial. When Magistrate prepare judgment, he raised five (5) issues and in each issue the Magistrate analyze both testimony and that's why appellants were acquitted to some offences. He was of the view that in case this court find there was no analysis of evidence on defence, this being the 1st appellate court he prayed for this court to analyze the defence.

On the issue of cross examination by fellow appellants/accused section 146 of Cap 6 the cross examination must be done against a person who incriminate the other. Appellants were denying to be involved in that offence without mentioning the other so according to him there was no need of cross examination by co accused (now appellants). He said the case of **Albanus Aloyce & Marco Ibrahim vs. Republic** (supra) is

distinguishable on the circumstance of the case at hand on the ground that in that case one accused incriminate the other.

About caution statement (Exh E10) which is the second ground he said the exhibit was not objected and the Court of Appeal already set precedent in the case of **Abbas Kondo Gede vs. Republic,** Criminal Appeal no. 472 of 2017 at page 20. On procedural irregularity it was his submission that court must see how that procedure affect the accused as was in **Stanley Murithi Mwaura vs. Republic,** Criminal Appeal No. 144 of 2009 CAT at DSM and **DPP vs. James Musumule and others** Criminal Appeal No. 397 of 2018. In the case at hand, the accused explained how they committed the offence and they did not object its admission, so according to him, the exhibit PE10 was correct and had all qualities to be tendered he pray it be maintained.

He further submitted that the evidence shows the 1st accused made oral confession and managed to show where he hides weapons. On the cited case of **Chamuriho Kerege@ Chamuriho Julius vs. Republic,** (supra) he said each case has to be decided on its own facts. With regard to other accused he submitted that record shows that they aided discovery of the weapon, ammunition and the Government trophies. The case has no

serious cross examination due to the confession. Appellants did not challenge and he find their conviction was legal. He prays the appeal to be found lacks of merits and be dismissed.

In rejoinder Mr. Tuthuru submitted that analysis of evidence by this court will come up with great fundamental irregularity, further caution statement to be admitted without objection does not oust this court power to examine its adimisibility.

I have thoroughly gone through the petition of appeal, submissions by parties and the appellants' complaints in this appeal. It is the duty of this court to determine whether the appeal is meritorious. The cardinal principle in criminal cases is that, it is upon the prosecution to prove the case against an accused person beyond reasonable doubt. This appeal will be analyzed basing on this principle as to whether the prosecution manages to prove offences beyond reasonable doubt, and in doing so I will combine all argued grounds of appeal and find whether the appeal is meritorious.

It is not in dispute that none of the prosecution witnesses saw the appellant entering in the National Park, kill elephants and hide the said

weapons used to kill elephants and thus, there is no direct evidence in that aspect.

In his argument when submitting Mr. Tuthuru complained on the procurement of Exh PE10 which is cautioned statement of 1st appellant. he said it procurement violated condition stipulated under section 57(4) of the CPA as there was no certificate of both, the recording officers and the accused. Due to that non-compliance, he said the caution statement has no evidential value. However, I wish to put it clear that, the trial court did not mention the complained exhibit in the judgment but reading the judgment to its entirely, he relied on prosecution witnesses PW1, PW2, PW4 and PW5 and mentioned exhibits with exclusion of Exh PE10 (see page 17 and 18 of the trial court judgment). That alone does not make Exh PE10 to be not relied by the trial Magistrate judgement as at page 18 when analyzing issue of unlawful possession of the Government trophies he based on interrogation of accused persons by police officers. Among the police officers who interrogate accused are PW1 and PW5.

In his testimony, PW5 informed the trial court that he interrogated accused (now appellants) and he record the 1st appellant statement on 04/01/2018 and on 05/01/2018 he made supplementary recording. I find interrogation

referred by the trial Magistrate is recorded in Exh PE10 that why witness prayed to tender it.

Whether exh PE10 complied with requirement of the law is the most important issue to analyze as raised by Mr. Tuthuru. Credibility of witnesses who interrogate accused will be analyzed later on. Counsel for the appellants complained for non-compliance of requirement of section 57(4) of the CPA which among other, requires the statement be read over to the accused after it has been recorded and afford him a chance to make correction if any.

Mr. Isihaka, learned State Attorney submitted that so far as the exhibit was not objected then it must remain in record relying on the case of **Abbas Kondo Gede vs. Republic** (supra). To him that is procedural irregularity and argue this court has to analyze how appellants were prejudiced and cited the case of **Stanley Murithi Mwaura vs. Republic** (supra). To him exhibit PE10 had qualities worth to be maintained.

For easy of reference, I find it apt to reproduce the provision of section 57 (4) which is claimed to have been contravened: -

'(4) Where the person who is interviewed by a police officer is unable to read the record of the interview or refuses to read, or appears to the police officer not to read the record when it is shown to him in accordance with subsection (3) the police officer shall-

(a) read the record to him, or cause the record to be read to him;

(b) ask him whether he would like to correct or add anything to the record;

(c) permit him to correct, alter or add to the record, or make any corrections, alterations or additions to the record that he requests the police officer to make;

(d) ask him to sign the certificate at the end of the record; and

(e) certify under his hand, at the end of the record, what he has done in pursuance of this subsection'

It is undisputed fact that nowhere in the document at issue was indicted that the document was read over to the appellant after PW5 had finished recording the statement. Neither was it elaborated by respondent during hearing of this appeal. It is crystal clear from the quoted provision that reading over the document is mandatory. It seeks to verify the correctness of the recorded statement lest some words might be imputed on the appellant's mouth and incriminate him as Mr. Tuthuru submitted. Looking at the essence of the rights the provision seeks to protect, it cannot be said

that the omission has to be analysed if caused injustice to appellants. Am fortified in this position by the case of **Musa Mustapha Kusa and Another vs. Republic**, Criminal Appeal No. 51 of 2010 (unreported) quoted in **Bulabo Kabelele and Mashaka Felician vs Republic**, Criminal Appeal No. 224 of 2011 (unreported) thus: -

> *'We should quickly point out that these elaborate provisions were not superfluously added to the Act. They had specific purpose.* ***Having been enacted after the inclusion of the basic right of equality before the law, in our Constitution, they were purposely added as procedural guarantees to this right. For this reason, therefore, police officers recording such interviews or recording suspects cautioned statements under both section 57 and 58 of the Act, have an unavoidable statutory duty to comply fully with these provisions.*** *They cannot at the risk of rendering the statement invalid, pick and choose which requirement to comply with and which ones to disregard. The conditions stipulated in these two sections are cumulative and the duty is mandatory.'[Emphasis added]*

In the case of **Abbas Kondo Gede vs. Republic** (supra) exhibit tendered was 77 pellets of cocaine hydrochloride which, in itself is a complete item, tangible and appellant had a legal representation of an Advocate who did not seriously challenge it during admission. In the case at hand, the exhibit

is a document which has procedures for its preparation and appellants fended for themselves. That case is distinguishable from the one at hand. It is true that in the case at hand the statement (exhibit PE10) was not objected when tendered but the requirement of the law has to be adhered as procedural guarantee of the appellants rights. See **Bulabo Kabelele and Mashaka Felician vs. Republic** (supra).

This being a first appellate court hence with power to re-evaluate the evidence on record as the trial court, and as was insisted by the Court of Appeal that is the duty of this court to make sure the law is compiled of. This was in **Adinardi Iddy Salim & Another vs. Republic** (Criminal Appeal 298 of 2018) [2022] TZCA 9 (11 February 2022) thus;

> *'In addition, the omission to comply with the mandatory statutory requirement cannot be remedied by the failure by the appellants to object the same* ***because it was incumbent on the trial Judge to ensure that the law is complied with to the letter before acting*** *on the dying declaration.'*

I am of the firm view that the omission to read statement to the 1st appellant after it was recorded rendered the statement's admission in court improper. The consequence is to expunge it from the Court record as I hereby do. see **Adinardi Iddy Salimu and Another vs. Republic**

(supra) and **Chamuriho Kirenge @ Chamuriho Julius vs. Republic** (supra).

Having expunged the cautioned statement what remains is testimonies of prosecution witnesses PW1, PW2, and PW5 and the oral admission done to witnesses.

It is settled that an oral confession of guilt made by a suspect before or in the presence of reliable witnesses, be they civilian or not, maybe sufficient by itself to ground conviction against the suspect. See: **The Director of Public Prosecutions vs. Nuru Mohamed Guramrasul,** [1988] T.L.R. 82; **Mohamed Manguku vs. Republic**, Criminal Appeal No. 194 of 2004, **Posoho Wilson @ Mwalyego vs. Republic**, Criminal Appeal No. 613 of 2015 and **Tumaini Daudi Ikera vs. Republic**, Criminal Appeal No. 158 of 2009. Court of Appeal insisted that such an oral confession would be valid as long as the suspect was a free agent when he said the words imputed to him.

Further, credibility of witnesses who report the said oral confession must be determined too. That is to say, where the trial court decided to relied on appellants interrogation by witnesses, has to determine the credibility of

the testimonies too. It is undisputed that appellants were interrogated. Reading through the whole trial proceedings I find contradiction on how the Government trophies were discovered. Let witnesses speak out themselves.

PW1 (a police officer) informed the trial court;

> *'....we interrogated four accused person here in court if they had elephant tusks....accused persons did not deny, they confess to have it and they showed us where they buried them, it was the (sic) outside the house of the first accused where there were the trip of sand dump,* ***they begin to dig*** *and brought out four elephant tusks. .....they told us they killed two elephants in the National Park by using gun and remove its (sic) tusks.'* (Page 71 of the proceedings)

PW2 (Robanda village chairman) testified to the effect that;

> *'.....they interrogated them and accused persons explain to us that they had the elephant tusks and show us where they buried them at the sand dump outside the first accused persons' house.* ***We started to dig*** *and the four elephant tusks were brought out. The police officer asked the accused persons how they got those tusks, four accused persons explained that they killed the elephants by using a gun and remove its tusks. The accused persons show us where they hide the gun....'* (page 84 of the proceedings)

Testimony of PW5 a police officer and who interrogated the 1st appellant goes like this;

> *'The four accused persons confessed to own the elephants' tusks and they showed us where those tusks were hidden. The 1st accused person ordered his wife to bring a hoe and* ***he start to dig and brought out*** *the four Elephant tusks, the four elephant tusks were fresh. We asked them to bring the weapons used to kill the elephant, the four accused person show us where they hid the gun at a fence.'*
>
> (page 118 of the proceedings)

I find contradiction on prosecution witnesses on how the said tusks were revealed. Which witness among the three to believe on the discovery of tusks. Was the sand dug by first appellant or village chairman together with police officers or all appellants.

As I stated early above, the cardinal principal in criminal law is that the burden of proof always lied on prosecution shoulders. There are plethora of authorities on this stance. See the decision of the Court of Appeal in **Galus Kitaya vs. The Republic,** Criminal Appeal No. 196 of 2015 CAT at Mbeya where it was held as follow;

'It is cardinal principle of criminal law that the duty of proving the charge against an accused person always lies on the prosecution. In the case of ***John Makolebela Kulwa Makolobela and Eric Juma @ Tanganyika*** *[2002] T.L.R. 296 the Court held that: "A person is not guilty of a criminal offence because his defence is not believed; rather, a person is found guilty and convicted of a criminal offence because of the strength of the prosecution evidence against him which establishes his guilt beyond reasonable doubt.'*

As far as the prosecution evidence in this case are concerned, it raises a doubt, huge doubt due to the contradictions between material witnesses PW1, PW2 and PW5. Tusks are the Government trophies and is the base of apprehension and charge to appellants. Due to the importance of this item, I find the contradiction is major and it goes to the root of the case. The discrepancies dented the prosecution case as the PW1, PW2 and PW5 were material witnesses who were at the scene. It is the settled position that contradiction can be considered as fatal if it is material going to the root of the case. See. **Sebastian Michael & Another vs. The Director of Public Prosecutions,** Criminal Appeal No. 145 of 2018, CAT at Mbeya. It is also settled that doubts should benefit appellants. See **Chacha Ng'era vs. The Republic**, Criminal Appeal No. 87 of 2010 (July 2013) CAT at

Mwanza and **Marwa Joseph @ Muhere & Another vs. Republic**, Criminal Appeal Case No. 96 of 2021.

Am puzzled which witness to believe among three, The Court of Appeal in the case of **Mohamed Said vs. The Republic,** Criminal Appeal No. 145 of 2017 held that a witness who tell a lie on a material point should hardly be believed in respect of other points. See also **Zakaria Jackson Magayo vs The Republic,** Criminal Appeal No. 411 of 2018, CAT at Dar es salaam. I find testimony of listed prosecution witnesses contain lying at some points. Therefore, this court left with no scrap of evidence to support the conviction of the accused person for the offences charged.

The above said and done, from analysis I allow the appeal. I find the appeal is meritorious to the extent explained above and I hereby allow it. I quash the convictions and set aside the sentences uttered against the appellants. I order the appellants to be released from prison unless lawfully held.

DATED in **MUSOMA** this 31th Day of July 2023.

THE HIGH COURT OF TANZANIA
MUSOMA

M. L. KOMBA

Judge

Judgement delivered in chamber in the presence of Mr. Kisigiro, counsel for appellants and in the absence of State Attorney for the Republic.

M. L. KOMBA

Judge

31 July, 2023