IN THE HIGH COURT OF TANZANIA

MUSOMA DISTRICT REGISTRY

AT MUSOMA

CRIMINAL APPEAL NO. 62 OF 2022

(Original Economic Case No. 03of 2021 of the District Court of Serengeti at Mugumu)

MWITA MARWA @ KOHE..... APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

JUDGMENT

16th & 23th August, 2023

M. L. KOMBA, J.:

The appellant was arraigned before the District Court of Serengeti at Mugumu (the trial court) charged with three 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 as amended by the Written Laws (Miscellaneous Amendments) Act No. 11 of 2003 (the NPA).; **two**, unlawful possession of weapons at Nyanguge area into Serengeti National Park to wit one machete, one spear and three animal trapping wires without permit contrary to section 24(1)(b) and (2) of the NPA.; and **three**, unlawful possession of Government trophies to wit two fresh hind limb of impala and one fresh head of Impala equal to one Impala unlawful killed

contrary to section 86 (1) and (2)(c)(ii) of the Wildlife Conservation Act No. 05 of 2009 (the WCA) 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) .

After full trial, Serengeti District Court, found the appellant guilty, convicted and sentenced him to pay Tsh. 500,000/ as fine or to serve a custodial sentence of two (02) year for the first count, to pay Tsh. 200,000/ as fine or to serve a custodial sentence of year (01) year for the second count and twenty (20) years imprisonment for the offence in the third count, it ordered the sentence to run concurrently.

Aggrieved, **Mwita Marwa** appealed to this Court with three (3) grounds of appeal that;

1. *That, the trial magistrate erred in laws and facts to conviction and sentence the appellant by admitted wrong evidence that was produced by the prosecution side that the evidence that testimony by PW1 and PW2 at the trial court was wrong evidence because the evidence was not collaborated as the charge sheet read. (Sic)*
2. *That, the trial magistrate erred in laws and facts to conviction and sentence the appellant by admitted wrong evidence that was produced by the prosecution side that during the time of destroying*

government trophies I was not there because the trial court has no evidence that supporting that during the time of destroying of the government trophies I was there like to take a photographer as a laws say. (Sic)

3. *That, the trial magistrate erred in laws and facts to conviction and sentence the appellant because I did not sign the inventory form that produced by the prosecution side as exhibit, even the certificate of suize that produced as exhibit I did not signed it. (Sic)*

When the matter was scheduled for hearing, appellant was remotely connected from Musoma Prison, stand solo unrepresented, while respondent, the Republic was represented by Ms. Agma Haule, Ms. Evangelina Ephrahim, Ms. Joyce, Ms. Natujwa Bakari and Mr. Abdulher Sadiki all being State Attorneys.

In support of the appeal, the appellant prayed this court to adopt his petition of appeal as filed.

Responding the appeal, Ms. Agma register the position of the respondent that is against the appeal and joined 2 and 3 ground of appeal which was about his absence when disposition was done and the like. She submitted that Disposition is done under PGO paragraph 28 and section 101 of the WCA provide procedures on what to do in case the trophy is destroyed.

She said the accused must be present during disposal proceedings to hear the disposal order and that PW3 explain at page 41-45 of the proceedings that the witness and accused went to Magistrate for disposal order and inventory was tendered. It was her submission that it is not requirement of law the appellant to be around during disposition but when seeking for order.

State Attorney submitted further that the taking of photograph is option depend on circumstances the word used in the act is "where possible" and therefore she found the trial Magistrate should not be faulted. In support of her stance she cited the case of the **EX- G 2434 PC George vs. Republic,** Criminal Appeal No. 8 of 2018 at Moshi where it was held that the absence of photograph will not vitiate the inventory. Further at pages 34 and 39 of proceedings witnesses explain the appellant signed certificate of seizure.

On the 1st ground about evidence of PW1 and PW2 not to be corroborated by charge sheet. It was her submission that the first count is not an offence the appellant may be found not guilty on that count but the rest of the counts has been proved. She explained that PW1 and PW2 found the

appellant with weapon without permit and exh P1 was tendered which was certificate of seizure.

On the last count it was her submission that appellant was found in possession of the Government, this is an offence regardless of the position where the accused was found. She said there was exh P1(seizure certificate) and exh P4 (inventory) which was prepared and tendered to prove the appellant was found in possession of Government Trophy. It was her submission that appellant confessed to be found in the National Park. Trophy being perishable, the appellant was taken to the Magistrate for disposition order as was in the case of **Mohamed Juma Mpakama vs. Republic,** Criminal Appeal No. 387 of 2017 CAT Mtwara. She prayed this court to find the appeal lacks merit and uphold trial court decision.

During rejoinder the appellant pray this court to release him. That mark the end of submission and the duty of this court is to find out if the appeal is meritorious. In doing so I find only if prosecution managed to prove offences beyond reasonable doubt as this is a criminal case the standard is high.

Starting with counts as charged the appellant herein, the appellant was charged with three counts including unlawful entry into the National Park contrary to section 21 (1) (a), (2) and section 29 (1) of the National Parks Act. This court finds there is no offence of unlawful entry to National Park as the offence is only found in margin note of section 21 of NPA whilst S. 26 of Interpretations of Laws Act, Cap 1 R. E. 2019 is to the effect that marginal note is not the law. Moreover, the position has been set by the Court of Appeal in the case of **Dogo Marwa @ Sigana** and **Mwita vs. Republic** Criminal Appeal No. 512 of 2019 CAT at Musoma where the CAT provides that since Written Laws (Miscellaneous Amendments) Act No. 11 of 2003 came into force, there is no offence of entry in the National Park. Therefore, as submitted by state Attorney the appellant is acquitted from the first count. First count is discarded from the record.

Now I will analyse all evidence to find whether the offence was proved to the required standard. On the rest of counts, the appellant was charged with offence of unlawful possession of weapons and Government trophy while at Nyanguge in Serengeti National Park without permit contrary to section 24(1)(b) and (2) of the NPA. Weapons were one machete, one spear and three trapping wires. The prosecution did not explain exactly

where this Nyagunge is found to differentiate the National Park boundaries and other area. In the case of **Dogo Marwa @ Sigana** and **Mwita vs. Republic** (supra) the court insisted the importance of indicating specific area within the statutory boundaries which the appellant is arrested by providing GPS or coordinates.

It is true that being found in possession of the Government trophy anywhere is an offence. Reading testimony of PW1 at page 34 and PW2 at page 39 of the trial court proceedings being arresting officers they narrated what they saw appellant while in patrol, they saw the appellant alone with weapons and Government trophy. From their story appellant had machete, spear, three animal trapping wires, one fresh head of Impala with skin and two fresh hind limbs of Impala attached with skin. These witnesses failed to narrate those head and limbs was in what storage as they found it after arrest. Was he carrying them in his hands or wrapped in paper bag or carried in his head? Appellant has only two hands, if the head and the hind limb was in his hands, then where was the weapons which was said to be found in his possession. Was it in his hands too? How did he manage to possess all items as mentioned by the PW1 and PW2.

Prosecution key witness failed to inform the trial court what exactly happened at the scene and what they saw when they arrest the appellant.

Furthermore, PW1 at page 34 informed the trial court that;

> *'I was together with Venance Muhoma, Baraka Saitabahu, and Marwa Nyamhanga while patrolling we saw one person walking into Serengeti National Park, we went closer to him and succeeded to arrest...'*

PW 2 had the same story at page 39 of the proceedings thus;

> *'I was together with leonatus Mabina (PW1) and Baraka seteban, while patrolling we saw a person is walking within National Park, we went closer...'*

And the charge reads appellant was found at Nyanguge area within Serengeti National Park. Do you think the charge was proved; the answer is no as both witnesses none of them mentioned the area Nyanguge in their testimony. They just testify that they arrest appellant within Serengeti National Park. The offence cannot be said to be proved.

Proving an offence beyond reasonable doubt has been defined in the case of **Samson Matiga vs. Republic**, Criminal Appeal No. 205 of 2007, CAT at Mtwara (unreported) where the Court of Appeal said;

'What it means, to put is simply, is that the prosecution evidence must be strongly as to leave no doubt to the criminal liability of an accused person.'

And traces its root in under section 3 (2) (a) of the Evidence Act, Cap. 6 R.E. 2019 that;

'A fact is said to be proved when- (a) In criminal matters, except where any statute or other law provides otherwise, the court is satisfied by the prosecution beyond reasonable doubt that the fact exists;'

From the above analysis, I find prosecution failed to prove the offence to the required standard.

From the analysis the prosecution evidence creates doubts and that the doubt created has to benefit the appellant as was decided in **Aidan Mwalulenga vs. Republic**, Criminal Appeal No. 207 of 2006; **Chacha Ng'era vs. The Republic**, Criminal Appeal No. 87 Of 2010 (July 2013) CAT at Mwanza.

I find the appeal is meritorious to the extent above and I hereby allow it. I quash the conviction and set aside the sentence uttered against the appellant. I order the appellant to be released from prison unless lawfully held.

DATED in **MUSOMA** this 23th Day of August, 2023.

M. L. KOMBA

Judge

Judgement delivered in chamber in while Mr. Abdulkher Sadik, State Attorney connected from NPS officed in Musoma and the appellant was connected from Musoma Prison.

M. L. KOMBA

Judge

23 August, 2023