IN THE HIGH COURT OF TANZANIA

MUSOMA DISTRICT REGISTRY

AT MUSOMA

CRIMINAL APPEAL NO. 54 OF 2023

(Originating from Economic Case No. 07 of 2022 of the District Court of Tarime at Tarime)

KHOE S/O MARWA @ KHOE.....1ST APPELLANT

KISIRI S/O BURUDE @KHOE.....2ND APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

JUDGMENT

30 August & 6th Sept, 2023

M. L. KOMBA, J.:

The appellants were charged with three counts and were convicted by District Court of Tarime at Tarime (the trial court) on two offences; **one,** unlawful possession of weapons at Korongo la Nyamoko area within Serengeti National Park to wit one Knife and three animal trapping wires without permit contrary to section 24(1)(b) and (2) of the NPA.; and **two,** while at Korongo la Nyamoko area within Serengeti National Park was in unlawful possession of Government trophies to wit one fresh fore limb of zebra worth Tsh 2,782,800/ contrary to section 86 (1) and (2)(iii) 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, Tarime District Court, found both appellants guilty, convicted and sentenced them to pay Tsh. 200,000/ as fine or to serve a custodial sentence of one year (12 months) for the second count and twenty (20) years imprisonment for the offence in the third count.

Aggrieved, both **KHOE S/O MARWA @ KHOE** and **KISIRI S/O BURUDE @KHOE** appealed to this Court with five (5) grounds of appeal which read as follows;

1. *That trial Magistrate erred in law and facts to convict and sentence the appellants by convicting and sentencing the appellants by relying on prosecution evidence which was not corroborated by any other independent witness apart from Park Rangers who were the witnesses from the same working station who cooked the evidence to facilitate conviction and sentence against appellants.*
2. *That, the learned trial Magistrate erred in laws and facts to heed that prosecution side proved the case against the appellants beyond all reasonable doubt while their evidence leave a lot of discrepancies in respect of arrest which effected against the appellants as they were arrested at different places and date.*
3. *That, the trial Magistrate erred in laws and facts to convict and*

sentence the appellants on procedural irregularity, since the appellants were not informed their rights before the trial court as the result they failed to cross examine prosecution witnesses during the examination in chief and call their witnesses.

4. *That, the trial court erred in law and fact to convict and sentence the appellants by admitting and relied on the wrong exhibits which enacted by prosecution witness to found conviction and sentence against the appellants.*
5. *That, the learned trial Magistrate erred in law and fact to convict and sentence the appellants while the available prosecution evidence failed to prove the case against the appellants beyond all reasonable doubt.*

When the matter was scheduled for hearing, appellants was remotely connected from Tarime prison, stand solo unrepresented, while respondent, the Republic was represented by Ms. Beatrice Mgumba, State Attorney.

In support of the appeal, the appellants prayed this court to adopt their petition of appeal as filed.

Responding the appeal, Ms. Mgumba register the position of the respondent that second count was proved to the required standard. On the 1st ground about independent witness, Ms. Mgumba submitted that

appellants did not explain when the independent witness was not called as during arrest or during hearing of the case. However, she submitted that at the hearing of the case, the meaning of independent witness is a person who will not benefit when the case is finalized. She said, prosecution is satisfied that all prosecution witnesses were free and independent and that accused/appellants did not raise any doubt during hearing. She invited this court to read the case of **Goodluck Kyando vs. Republic** (2006) TLR 363 that each witness should be regarded credible unless there is reasonable ground to believe otherwise, in the case at hand, she submitted all witnesses were credible. She further submitted that S. 106 of WCA recognize difficulties in having independent witness when arrest and search is conducted in area which is not dwelling place and referred this court to the case of **Jason Pascal and Antidies Pascal vs. Republic**, Criminal Appeal No. 615 of 2020 that an arresting officer can conduct search and seize items if the arrest is done at the area which is not dwelling place.

While submitting on the 3rd ground Ms. Mgumba said trial court proceedings (the proceedings) show clearly that appellants cross examined prosecution witnesses, that means he utilized his rights although he did not elaborate which rights were not given to them and how that affects them

during trial. Further she submitted that when the trial Magistrate rule on the case to answer he pronounce rights to appellants and at page 34 of the proceedings appellants replied they will not have witnesses nor exhibit. Trial court record everything and no one is supposed to impeach the record as was in **Halfan Sudi vs. Habieza Chichiri** (1998) TLR 527. It was her argument that this ground is an afterthought.

The 2nd, 4th and 5th grounds were argued together about the proof of offence beyond reasonable doubt. State Attorney said in these grounds appellants complained that they were arrested at different points and the exhibits were wrongly admitted. It was her submission that PW2 and PW3 informed the trial court that they arrested appellants at Korongo la Nyamoke in the Serengeti National Park but appellants did not cross examine witnesses on their arrest so, she argued, the issue that they were arrested from different points has no merit as officers were in court and they did not dispute.

About exhibits she submitted that it was correct for exhibit to be tendered and it was upon the prosecution to know what exhibit will prove which offence. She submitted that, Exh P1 was three (3) wires and knife, Exh P2 was certificate of seizure of the items/weapons. Exh P3 was trophy

valuation report with the value of trophy and Exh P4 was inventory form and that all exhibits were genuine and admitted without objection. Ms. Mgumba invited this court to read the case of **Maruzuku Hamis vs. Republic** (1983) TLR at page 01 that story of the accused is for contrasting prosecution case not to be believed. She said the defence of appellant did not shake the prosecution case.

On proving the offence beyond reasonable doubt, she said appellants were found guilty over two offences, carrying weapons in the National Park and possessing Government trophy. On unlawful possession of trophy, she said prosecution did not manage to prove the offence as court record did not show that appellants were given right to be heard at the time of seeking disposition order contrary to what was in the case of **Mohamed Juma @Mpakama** that accused must be taken to Magistrate and the hearing to be conducted. In the case at hand, she reasoned that appellants were not given right to be heard before the order was given.

It was her submission that the offence of unlawful possession of weapon was proved to the required standard against appellants and Republic was supposed to prove that appellants were found with weapons. She submitted that PW2 and PW3 are the ones who arrested appellants and

they found appellants with weapons mentioned as proved by the certificate of seizure which was signed by appellants. Ms. Mgumba concluded that the certificate of seizure was enough to prove appellants were found with weapons.

She further submitted that PW2 at page 17 informed the trial court that Nyamoko is found in the Nation Park and it is like one hour from Nyamoko (which is within the National Park) going to the village where appellants reside. Further to that she succumbed that PW3 explained that from village to Serengeti Nation Park-Nyamoko area is like 50 kilometers. She is convinced and convincing this court too to believe that appellants were within Serengeti National Park.

After submission by State Attorney now this court is invited to determine whether the appeal has merit. Appellants complained that the offence were not proved against them as required by law. The two counts which were convicted of are being in possession of weapons while in the National Park and being found with Government trophy contrary to the law. Starting with the second count of being in possession of weapons within the national park the law, section 24(1)(b) and (2) of the NPA provides.

(1) No person shall, save under and in accordance with a permit in writing signed by an authorised officer, within any national park–

(a) ...

(b) carry or have in his possession or under his control any weapon in respect of which he fails to satisfy the Trustees or any authorised officer that it was intended to be used for a purpose other than the hunting, killing, wounding or capturing of an animal.

(2) Any person who contravenes any of the provisions of this section commits an offence and is liable on conviction to a fine not exceeding twenty thousand shillings or to imprisonment for a term not exceeding two years or to both.

It was the testimony of PW2 and PW3 at pages 15 and 19 respectively on how they arrested appellants with their weapons. Cross examination by appellants did not shake the testimony of these witnesses and exh PE1 was admitted. I find appellants were found with weapons. The issue is where they were found with those weapons. PW explained at page 16 the location of the Korongo la Nyamoko to Masanga village is 40 Kilometer and PW3 at page 20 explain the distance from village to Nyamoko area which is within the National Park is like 50 KM. I find prosecution managed to prove the location where they arrested appellants while possessing weapons and therefore the second count was proved to the required standard.

On the third count of being found in possession of the Government trophy, as submitted by the State Attorney the law require hearing to be conducted before the Magistrate before disposition order is issued. Reading exh PE4 which was inventory for disposition of the Government trophy I find Magistrate did not conduct hearing as was directed in the case of **Mohamed Juma @ Mpakama vs. Republic** (supra) while analyzing paragraph 25 of the PGO No. 229. That accused is supposed to be present before nearby Magistrate and be heard before the disposition order is issued. Appellants were not heard when disposition order was issued and therefore it cannot be proved that appellants were found in unlawful possession of the Government trophy. As submitted by State Attorney, prosecution failed to prove that actually appellants were found in possession of Government trophy as charged. This court too finds the third count was not proved.

I find the appeal is partly meritorious that appellants were found in possession of weapons while in National Park as charged in second count but it was not proved that they possess Government trophy as is in the third count. In that regard, I sustain the conviction and sentence on the

second count to both appellants which is imprison for twelve months (12) from 20/06/2023 and I hereby acquit them in respect of the third count.

It is so ordered.

DATED in **MUSOMA** this 6th Day of September, 2023.

M. L. KOMBA

Judge

Judgement delivered in chamber in the absence of representative of Republic while both appellants were connected from Tarime Prison.

M. L. KOMBA

Judge

6th September, 2023