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

CRIMINAL APPEAL NO. 45 OF 2023

(Originating from Economic case No. 46/2022 of Bariadi District Court)

1. BARAKA s/o SENI alias SITA .....
2. HOTELI s/o MASUNGA alias JAMES..... **APPELLANTS**
3. MABULA s/o MASE alias MALIMI.....

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGMENT

Date of last order: 24th October, 2023
Date of Judgment: 31st October, 2023

MIRINDO, J.:

During their normal patrol on 2nd August 2022 at Serengeti National Park, conservation rangers saw human footsteps along Mbalageti River. They traced the footsteps towards the bushes until they saw three persons. They identified them as Baraka s/o Seni alias Sita, Hoteli s/o Masunga alias James and Mabula s/o Mase alias Malimi. They arrested them and subsequently these persons were charged with two counts of unlawful possession of weapons and unlawful possession of government trophies at Bariadi District Court. The charge for unlawful possession weapons was brought under the

provisions of subsections (1) and (2) of section 24 of the National Parks Act [Cap. 282 R.E. 2002]. The charge for unlawful possession of government trophies was laid under the provisions of subsections (1) and (2) (b) of section 86 of the Wildlife Conservation Act [Cap. 283 R.E 2022] read together with paragraphs 14 of the first schedule to the Economic and Organised Crime Control Act [Cap. 200 R.E.2022] and its sections 57 (1) and 60 (2).

The gist of the prosecution evidence was that when the appellants were arrested along Mbalageti River, they were found with a knife, bush knife, three animal trapping wires, and four pieces of buffalo meat. Several exhibits were tendered in court without objection from the defence side.

After the close of the prosecution case, the trial magistrate concluded that all the appellants had a case to answer. After being informed of their right either to remain silent or to defend themselves, the accused persons chose to defend themselves on oath. All of them denied being arrested within Serengeti National Park. Baraka, the first appellant, stated that he was arrested at the border of the Serengeti National Park. Hoteli, the second appellant, and Mabula, the third appellant, testified being arrested in a village.

On being satisfied that the prosecution had proved the case beyond reasonable doubt, the trial magistrate convicted and sentenced the appellants on both counts.

The appellants appealed to this Court against their conviction and sentence. In their joint Petition of Appeal, they have raised five grounds that mainly attack the sufficiency of the prosecution evidence. Their main grounds of appeal to this Court are that the prosecution case was not proved beyond reasonable doubt for the following reasons: (i) there was no proof that they were arrested within Serengeti National Park; (ii) there was no proof that the pieces of buffalo meat were fresh; (iii) lack of independent witness to prove possession of government trophies and (iv) failure to tender cautioned statement. It was also the appellants' ground of appeal that the sentence was wrongly passed in the absence of a cautioned statement and evidence from an independent witness to prove that appellants possessed government trophies.

At the hearing of the appeal, the appellants, who were unpresented, did not address the grounds of appeal serially but merely argued that the trial court did not render justice to them. The respondent, represented by

Immaculata Mapunda, assisted by Nyamnyanga Magoti, learned State Attorneys, did not support the appeal.

In relation to the third ground of appeal, Ms. Mapunda, learned state attorney, argued that it is not a legal requirement that the cautioned statement should always be produced in court. It is not necessary to tender the cautioned statement if the prosecution does not believe that it will be of any assistance to the prosecution's case.

In response to the fourth ground of appeal, the learned state attorney argued that under section 143 of the Evidence Act [Cap. R.E. 2022] no specific number witness is needed in court to prove a particular fact. There were enough prosecution witnesses who proved the prosecution's case and there was need to call an independent witness as argued by the appellants.

She further argued that the complaint in the first ground of appeal that there were no exhibits to prove the appellant's arrest within Serengeti National Park was unfounded. The learned state attorney pointed out that the map indicating the location where the appellants were arrested was admitted at the trial without objection from the appellants.

Ms. Mapunda addressed this Court generally on complaints in the second and fifth grounds of appeal that the prosecution case was not proved

beyond reasonable doubt. She argued that the offence of unlawful possession of weapon in a national park was proved by three prosecution witnesses. The offence was proved by the testimony of the prosecution witnesses and the certificate of seizure that was admitted at the trial without objection. The appellants did not cross-examine the prosecution witnesses on the admissibility or truthfulness of the certificate of seizure. It follows, the learned state attorney argued, that the appellants' failure to cross-examine the prosecution witness on issue of seizure implied that the substance of the certificate of seizure was true. In support of this view, she made referred to the Court of Appeal's decision in **Shomari Mohamed Mkwama v Republic** (Criminal Appeal 606 of 2021) [2022] TZCA 644 (21 October 2022)

As regards the offence of unlawful possession of government trophy, Ms. Mapunda contended that the offence was duly proved by the first and second prosecution witnesses who arrested them and prepared the certificate of seizure. The certificate of seizure proved that the appellants were arrested with government trophy in the nature of buffalo meat. It was the fourth prosecution witness who was called for identification of the government trophy and established that it was buffalo meat.

The learned state attorney concluded that the prosecution case was proved beyond reasonable doubt, the appeal should be dismissed, and the decision of trial District Court upheld.

After hearing the appellant and respondent, the question is whether the case against the appellant was proved beyond reasonable doubt. This a first appeal to this Court and this Court is entitled to revisit the evidence before the trial court and arrive at its own conclusion.

Although the charge for unlawful possession of weapons laid against the appellants referred to subsections (1) and (2) of section 24 of the National Parks Act, the appropriate subsection should have been subsection (1) (b) of 24. However, this oversight did not prejudice the appellants' trial in terms of section 388 of the Criminal Procedure Act [Cap. 20 Re 2022]. This oversight was cured by the particulars of the offence set forth in the charge sheet. **Saganda Saganda Kasanzu v Republic** (Criminal Appeal 53 of 2019) [2020] TZCA 304 (18 June 2020)

A valid conviction for unlawful possession of weapons under subsection (1) (b) of section 24 of the National Parks Act arises if the prosecution proves that (a) the accused was within a national park; (b) while in the national park the accused was in possession of a weapon without a permit.

The concept of possession in criminal law has been defined in the following terms:

> *As a matter of normal language, the word 'possession' embraces a physical element, namely, that the accused had some degree of control over the... [Item]. It also connotes at least a basic fault element, such as knowing the item was there (you cannot be said to 'control' something if you do not even know of its existence): Leo, S., et al.,* ***Criminal Law in Malaysia and Singapore****, 2nd end, Lexis Nexis, 2012, page 38, paragraph 2.30*

Possession connotes control in the nature of actual or constructive knowledge as was held in **Moses Charles Deo v R** [1987] TLR 134 at 139:

> *We turn to consider the question of possession. Mr. Lipiki is perfectly right in saying that possession connotes knowledge on the part of the possessor. Common sense and justice require that it be so. The words of Lord Parker in* ***R. v Cavendish*** *[1961] 1 WLR 1083 at p. 1085 bears repeating here: for a person to be found to have had possession, actual or constructive, of goods it must be proven either that he was*

aware of their presence and that he exercised some control over them, or that the goods came, albeit in his absence, at his invitation and arrangement. But it is also true that mere possession sometimes denotes knowledge and control...

Similar views have been expressed in **Song Lei vs Director of Public Prosecutions and Others** (Consolidated Criminal Appeals 16 of 2016) [2019] TZCA 265 (30 August 2019) and **Nurdin Akasha alias Habab v R** [1995] TLR 227

An accused person cannot be in possession of an item if he is not in control of it but if he is in control of it, he is deemed to be in possession of it even though the accused may be mistaken about its content: **Warner v Metropolitan Police Commissioner** [1969] 2 AC 256; **Tan Kiam Peng v Public Prosecutor** [2007] SGCA 38.

This is clearly the intent of the legislature under subsection (1) (b) of 24 the National Parks Act which states in part the accused person must either "carry or have in his possession or under his control any weapon..."

It is a defence to a charge of unlawful possession of weapon that the accused had a valid permit. It was upon the prosecution to prove that while in

Serengeti National Park, the appellants were in possession of the weapons without a valid permit.

In the present appeal, two conservation rangers from Serengeti National Park, the first and second prosecution witness respectively testified that they arrested the appellants while in possession of a knife, bush knife and three animal trapping wires. It is not clear from their testimony from whom, among the appellants, the weapons were seized and whether the appellants were in control of those weapons. It is not clear where the weapons were located at the time the appellants were arrested. Much as these witnesses mentioned the location where the appellants were arrested, it was necessary to explain the state of possession of the weapons by the appellants.

At the trial the prosecution successfully tendered a certificate of seizure without objection from the appellants. As a general rule signing a certificate of seizure implies an acknowledgment of its contents. **Nabibakhsh Pirbakhsh Bibarde and Another v Republic** (Criminal Appeal 663 of 2020) [2023] TZCA 17269 (19 May 2023); **Song Lei vs Director of Public Prosecutions and Others** (Consolidated Criminal Appeals 16 of 2016) [2019] TZCA 265 (30 August 2019). Whether this rule applies in the facts of this case is open to

question. According to the first and second prosecution witness, they were on normal patrol at Serengeti National Park on 2nd August 2022 at 9.00 am when they saw human footsteps. They followed the footsteps until they reach the bushes where they saw the appellants. The certificate of seizure tendered at the trial as exhibit number P1 was also prepared at 9.00 hours. If one is to give allowance for the time spent in tracing the human footsteps at Mbalageti River and interviewing the appellants, it is doubtful that the certificate would have been prepared at the same time.

Given the circumstances of this case, there should have been some evidence to clarify the nature of the possession of weapons. The certificate of seizure which was signed by the appellants and conservation rangers alone was insufficient proof of possession.

Although the prosecution successfully tendered the certificate of seizure without objection from the appellants, the appellants, in their defence, denied being arrested within the Serengeti National Park. In effect, the appellants raised the defence of *alibi* but the defence was fleetingly dealt with by trial court. Though belated, the defence of *alibi* should have been considered in light of the prosecution case as a whole: **Rashid Seba v R** [2007] TLR 86 at

90-91. Also available at (Criminal Appeal 95 of 2005) [2007] TZCA 179 (16 March 2007)

Section 194 (6) of the Criminal Procedure Act [Cap 20 R.E. 2022] confers discretion on the trial court to consider a belated and an impromptu *alibi* raised by accused. In the leading case of **Charles Samson v R** [1990] TLR 39 at 42, the Court of Appeal held that subsection (6) of section 194 does not confer unfettered discretion on the trial court to reject a belated *alibi* raised by the accused person. According to **Charles Samson** the provisions of subsection (6) requires the trial court to act judicially in dealing with a belated *alibi*. This duty was clarified in **Mwita s/o Mhere and Ibrahim Mhere v R** [2005] TLR 107 at 114:

> *When this court in* Charles Samson *(1) said that a trial court should take into account the defence of* alibi *which was raised for the first time at the defence stage, it must have meant that the court acknowledges that the defence had been raised albeit belatedly, then it proceeds to the next stage, to exercise its discretion whether or not to accord any weight to it. Court's discretion must always be exercised judiciously.*

> *According to* **Black's Law Dictionary,** *(6 ed), judicial discretion is the exercise of judgment by a judge or court based on what is fair under the circumstances and guided by the rules and principles of law. It will not, therefore, be sufficient in our considered view, to merely say that the court has exercised its discretion not to accord weight of any kind to the defence of* alibi, *and rest it at that. That court has to demonstrate, however briefly, how that discretion has been exercised to reach the decision it takes.*

Central to the appellants' case was the fact that they were arrested near the border of Serengeti National Park. Since none of the prosecution witnesses established how the three sets of weapons were seized from the appellants, there is a reason to believe the appellants" version of *alibi* raised during their defence. This is so notwistanding the prosecution's successfully tendering of a map indicating the location in which the appellants were arrested.

The offence of unlawful possession of weapons presupposes entry in a national park and since this appears to be a borderline case, the appellants are entitled to a benefit doubt. As was held by the Court of Appeal in **Silva**

Makanyaga v R, Criminal Appeal 36 of 2002, Court of Appeal of Tanzania at Dar es Salaam (2006):

> *It is our considered opinion that if the inculpating prosecution evidence is accepted to convict an accused person despite his/her denial of guilt then the exculpatory parts of the prosecution evidence should also be taken into account in favour of the accused despite his/her denial of guilt. If there is a reasonable doubt as to the availability of a certain defence to the charge, hence that is not proof beyond reasonable doubt and the accused should benefit.*

In **Abdallah Jeje v R**, Criminal Appeal 195 of 2007, the deceased, who was watchman in an international organisation, was killed at his working place and various items were stolen from his employer's office. Following a tip from an informer, the Police arrested the accused, searched his home and found several items including a red torch of the National brand. At trial for murder the accused admitted that he was in possession of the red torch at the time of his arrest but claimed that it belonged to him. However, the trial court partly relied on this piece evidence to corroborate accused's extra judicial and cautioned statements. He was convicted for murder and appealed to the Court

of Appeal. The Court of Appeal held that it was crucial for the prosecution to prove that the red torch belonged to the employer of the deceased before the doctrine of recent possession could be invoked. The Court concluded that:

> *This piece of evidence introduced another possible view, that any other person, including the appellant could have owned the torch legally, particularly in the absence of any special marks on Exhibit P5 that could have (differentiated?) it from other similar torches. Now, in law, where there are two possible views on the evidence adduced in a case of circumstantial evidence, one pointing to the guilt of the accused and the other to his innocence, a court of law must adopt the one favourable to the accused....*

The appeal before me was a borderline case in which the appellants are entitled to a benefit doubt.

I have come to the conclusion that the offence of unlawful possession of weapons in Serengeti National Park was not proved beyond reasonable doubt.

There are similar doubts in connection with the second offence of unlawful possession of government trophy under under subsection (1) of

section 86 of the Wildlife Conservation Act [Cap. 283 R.E. 2022]. In a charge for unlawful possession of government trophy, the prosecution must prove that the accused was in control of the item that constitutes government trophy as defined under the provisions of the Wildlife Conservation Act.

The first and second prosecution witnesses testified that they arrested the appellants while in possession of four pieces of wild meat which is a government trophy. It was a wildlife officer, the fourth prosecution witness, who identified the four pieces of the government trophy as four pieces of buffalo. The prosecution also successfully tendered the trophy valuation certificate. The prosecution evidence is silent about the state in which the buffalo meat was seized from the appellants and where it was located at the time of the arrest.

Despite the attempts by Ms. Mapunda, learned state attorney, to convince this Court that the offence of unlawful possession of government trophy was proved beyond reasonable doubt, it is my considered view that it was not.

For these reasons, I allow the appeal. I set aside the conviction and sentence imposed by the trial District Court of Bariadi with an order that the

appellants be set at liberty forthwith unless they are lawfully detained in prison for another cause.

F. M. Mirindo
Judge
31/10/2023

Order: Judgment delivered 31st day of October, 2023, in the Presence of the appellant in person and Mr. Goodluck Saguya, learned State Attorney, for the Respondent. **B/C** Ms. Sumaiya Hussein- Record management assistant, present.

Right of appeal explained.

THE HIGH COURT OF TANZANIA

F. M. Mirindo
Judge
31/10/2023