IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF MUSOMA

AT MUSOMA

CONSOLIDATED CRIMINAL. APPEALS NO. 128 AND 140 OF 2020

LUCAS MARWA @ CHAMA .... 1ST APPELLANT
MARWA NYAMHANGA @ MANKO .... 2ND APPELLANT

VERSUS

THE REPUBLIC .... RESPONDENT

(Appeal from the judgment of the District Court of Serengeti at Mugumu in Economic Case No. 35 of 2019)

JUDGMENT

23rd March and 21st April, 2021

KISANYA, J.:

The appellants Lucas Marwa @ Chama and Marwa Nyamhanga @ Manko were charged before the District Court of Serengeti at Mugumu in Economic Case No. 35 of 2019, with three counts namely:

1. *Unlawful Entry into the National Park, contrary to sections 21 (1) (a), (2) and 29(1) the National Parks Act [Cap 282, R.E. 2002] as amended by the Written Laws (Miscellaneous Amendments) Act No. 11 of 2003;*

2. *Unlawful Possession of Weapons in the National Park, contrary to section 24(1)(b) and (2) of the National Parks Act [Cap 282,*

R.E. 2002]; and

3. *Unlawful Possession of Government Trophies, contrary to section 86 (1) and (2) (c)(iii) of the Wildlife Conservation Act, No. 5 of 2009 as amended by the Written Laws (Miscellaneous Amendments) Act No. 2 of 2016 read together with paragraph 14 of the First Schedule to and section 57(1) and 60(2) of the Economic and Organized Crime Control Act [Cap. 200, R.E 2002] as amended by the Written Laws (Miscellaneous Amendments) Act No. 3 of 2016.*

After a full trial, the appellants were convicted of all counts and sentenced to one year imprisonment for the 1st and 2nd counts. As regards the 3rd count, they were sentenced to pay a fine of Tshs. 83, 600,000 in default to serve twenty years' imprisonment with the sentence to run concurrently.

The appellants were aggrieved with both the conviction and sentence. They filed two separate petitions of appeal but with similar grounds of appeal. An appeal by Mr. Lucas Marwa @ Chama (hereinafter referred to as first appellant) was registered as Criminal Appeal No. 128 of 2020. On the other hand, the appeal by Mr. Marwa Nyamhanga @ Manko (second appellant) was admitted as Criminal Appeal No. 140 of 2020. By order of this Court, both appeals were merged as Consolidated Criminal Appeals No. 128 and 140 of 2020 and the controlling record being Criminal Appeal No. 128 of 2020.

The petitions of appeals were constituted by 7 grounds of appeal which I have condensed into five grounds as follows: One, that the appellants were convicted and sentenced basing on wrong exhibits. Two, that the prosecution witnesses gave wrong, hearsay and contradicting evidence. Three, that the charge sheet was defective for want of the sentencing provision. Four, that the appellants were denied the right to call witnesses. Five, that the defence case was not considered by the trial court.

Therefore, the appellants pray that the appeal be allowed, conviction be quashed and sentence set aside.

The brief facts of this case went as follows: Athanas Magesa (PW1), Ezekiel Kulwa (PW3) and Wilson Adam are park rangers working with Tanzania National Parks and stationed at Serengeti National Parks (SENAPA). On 24th April, 2019 they were on patrol at Grumet area within SENAPA. In the course of executing their duties, they found the appellants and one person, arrested them and found them in possession of two knives, one spear, one panga and eight fresh legs and one head of buffalo. Since the appellants had no relevant permits, PW1 and PW3 seized the said items as per the certificate of seizure (Exhibit PE1). Thereafter, the appellants and the other person were taken to Mugumu Police Station where an investigation file No. MUG/IR/1310/2019 was opened and all items found in their possession was handed over to the police.

At the police, G. 4209 D/C Steven (PW4) was assigned to investigate the matter. In so doing, he called Wilbroad Vicent (PW2) to identify and value the trophies alleged to have been found in possession of the appellants. On 26th April, 2019, PW2 identified the said eight fresh legs and one head of buffalo as government trophy and valued the same to Tshs. 8,360,000. He filled in and signed the Trophy Valuation Certificate (Exhibit PE3).

Since the identified government trophies were subject to a speed decay, PW4 took the appellants to the Magistrate to seek for an order of disposing the said trophies. The order was granted as per inventory form (Exhibit PE4) tendered by PW4. Thereafter, the appellants were prosecuted, convicted and sentenced as stated herein, thereby leading to this appeal.

At the hearing of this matter, the appellants appeared in person while Mr. Nimrod Byamungu, learned State Attorney appeared for the respondent.

Both parties made their respective submissions for and against the appeal. I will consider the submissions made by each party in the course of addressing issues pertaining to this appeal.

In my considered view, the appellants' oral submission calls me to determine whether the third offence was proved beyond all reasonable doubts. It was the appellants' argument that the trial

court erred in convicting them for the third count. Their argument was based on the reasons that: the government trophies found in their possession were not tendered in evidence; the identification and valuation of government trophies by PW2 was conducted in their absence; they did not sign the valuation report; and that they were not present when PW4 sought for the order of disposing the Government Trophies before the magistrate.

Mr. Byamungu replied that it is not a legal requirement for the accused to be present at the time of valuing the Government trophies. He went on to submit that the appellants were present at the time of seeking the order for disposing of the Government trophies before a Magistrate.

It is common ground that the trophies alleged to have been found in possession of the appellants was not tendered in evidence. It is also not disputed that the prosecution tendered the certificate of seizure (Exhibit PE1), the valuation certificate (PE2) and the inventory form (PE4) to prove the third count. The appellants argue, in the first and second ground that the exhibits and evidence were wrong. On the other hand, the learned state attorney is of the view that the exhibits were relevant and the prosecution witnesses were competent to adduce evidence.

It is deduced from the evidence of PW1, PW3 and Exhibit PE1 that the appellants were found in possession of eight fresh legs and one head of buffalo. As rightly argued by Mr. Byamungu, the appellants

did not object admission of Exhibit PE1. Also, they did cross examine PW1 and PW3 who gave the incriminating evidence. The next question is whether what was seized from the appellants is Government trophies or something else. If the answer is in affirmative, was the value of the said trophies proved?

The answer to the said question is found in the evidence of PW2 who testified to have identified and valued the Government trophies. In his evidence on oath, PW2 introduced himself as park warden. Now, in terms of sections 86(4) and 3 of the WCA, park warden is not among the officers with mandate to conduct valuation of a trophy. The officers named in thereto are Director of Wildlife, wildlife ranger, wildlife warden and wildlife officer. I have noted that Exhibit PE2 shows that PW2 is wildlife warden. However, such evidence was contradicted by the evidence adduced on oath by PW2. It follows that the trophies were not valued in accordance with the law. Since the value of trophies is necessary in sentencing the accused, I am of the view that the third count was not proved. For that reason, I find it not necessary to consider the procedure employed in disposing of the alleged trophies. This finding decides the 5th ground.

I will therefore proceed to address the remaining grounds of appeal but in relation to first and second counts.

The first ground is to the effect that the trial court admitted wrong exhibits. Mr. Byamungu submitted that all exhibits were tendered in accordance with the law and that they were related to the case

levelled against the appellants. He went to submit that the appellants did neither object admission of the said exhibits nor cross examine the prosecution' witnesses.

As far as the first and second counts are concerned, the exhibits tendered by the prosecution are Seizure Certificate (Exhibit PE1) and the weapons to wit one panga, two knives and one spear (Exhibit PE2) tendered by PW1. It should be noted that PW1 and PW3 testified that the appellants were found in the National Park while in possession of the said weapons and that they failed to produce the required permits. Therefore, as rightly observed by Mr. Byamungu, exhibit PE1 and PE2 were not wrong exhibit. They were relevant to prove the first and second count levelled against the appellant. I therefore find the first ground meritless.

In the second and third ground, the appellants contended that the prosecution evidence was wrong, contradictory and hearsay. On the other hand, the learned State Attorney argued that PW1, PW2, PW3 and PW4 were competent witnesses under section 127 of the Evidence Act [Cap. 6, R.E. 2019]. He also submitted that all witnesses gave direct evidence which corroborated each other. Thus, he was of the view that the prosecution witnesses did not contradict each other and did not adduce hearsay evidence.

Reading from the evidence on record, I agree with Mr. Byamungu that prosecution witnesses (PW1 and PW3) were competent. Being the officers who were on patrol on the material date, their evidence

was direct. They adduced that the appellants were found at Mto Grumeti area within SENAPA in possession of the weapons named herein without permits. It is clear that PW1 and PW3 corroborated each other. I find no contradiction in their evidence. The appellants did not cross examine PW1 and PW3 who gave evidence which implicated them in the case at hand. Therefore, they are taken to have admitted evidence deposed by PW1 and PW3. In that regard, the 2nd and 3rd grounds are meritless.

On the issue of defective charge raised in the 4th ground, I agree with Mr. Byamungu that the sentencing provisions were cited in the first and second counts. The charge sheet cited section 29(1) of the National Parks Act (supra) as amended by the Written Laws (Miscellaneous Amendments Act] No. 11 of 2003 which provides the sentence for offence of unlawful entry into the National Park and section 24 (2) of the National Parks Act (supra) which prescribes the sentence for offence of unlawful possession of weapons in the national park. It follows that, the sentence of one year imposed by the trial court for the first and second counts are in accordance with the law. For that reason, the fourth ground is also devoid of merit.

I now move on to determine the sixth ground. The appellants lament that they were not accorded the right to call their witnesses. The learned State Attorney submitted in reply that the right to call witnesses was given to the appellants. I am mindful that the right to call witness is one of the aspect of the right to a fair hearing provided

for under Article 13(6)(a) of the Constitution. It is trite law that any proceeding conducted in violation of the right to be heard including that of calling witnesses is a nullity.

In this case, the appellants indicated that they intended to call four witnesses. The trial court issued an order to the effect of notifying the witnesses named by the appellants. Just before the defence hearing could take off, the appellants are recorded to have informed the trial court their witnesses were nowhere to be found. They proceeded to give their testimony on oath and closed their respective defence case. Therefore, I am satisfied that the appellants were not denied the right to call witnesses.

Lastly, the appellants state in the seventh ground that their defence was not considered. Mr. Byamungu vehemently denied the appellants' contention. He submitted that the defence case was duly considered by the trial court. In addressing this ground, I have carefully read the evidence adduced by the appellants. The first appellant testified to have been arrested by the park rangers at his friend's farmland. On his side, the 2nd appellant stated that he was arrested when he was grazing nearby his house. Both appellants deposed that the park rangers asked them whether they had seen poachers. That upon responding not in affirmative, they were taken to Mugumu Police station and implicated in the case at hand. I have also read the judgment and noted that the said defence was duly considered at page 4, 5 and 6. The learned trial magistrate was of

the view that the appellant adduced evidence which could not exonerate them from the offence. Therefore, this ground is meritless as well.

For the reasons I have endeavored to highlight, the appeal is partly allowed as follows:

1. The appellants' appeal against conviction and sentence in respect of the first and second counts is dismissed for want of merit.
2. The appellants' conviction and sentence on the third count of unlawful possession of government trophies is quashed and set aside.

Consequently, the appellants shall continue to serve the sentence of one year imprisonment imposed by the trial court in respect of the 1st and 2nd counts. For the avoidance of doubt, the said sentence run concurrently from 30th June, 2020 as ordered by the trial court.

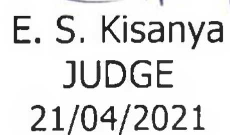
Ordered accordingly.

DATED at MUSOMA this 21st day of April, 2021.

E. S. Kisanya
JUDGE

COURT: Judgment delivered through video conference this 21st April, 2021 in the appearance of the appellants and in the absence of the respondent.

Right of appeal to the Court of Appeal is well explained.



E. S. Kisanya
JUDGE
21/04/2021