

**IN THE HIGH COURT OF TANZANIA**

**MUSOMA DISTRICT REGISTRY**

**AT MUSOMA**

**CRIMINAL APPEAL NO. 56 OF 2022**

*(Arising from the decision of the District Court of Serengeti at Mugumu in  
Economic Case No. 12 of 2021)*

**BETWEEN**

**CHACHA S/O GITANO @ GONGO ..... 1<sup>ST</sup> APPELLANT**

**MAKENA S/O MNIKO @ GIRYAGO ..... 2<sup>ND</sup> APPELLANT**

**ZEDEKIA S/O NYAGUOKA @ MAGARA ..... 3<sup>RD</sup> APPELLANT**

***VERSUS***

**THE REPUBLIC ..... RESPONDENT**

**JUDGMENT**

*26<sup>th</sup> & 26<sup>th</sup> July, 2023*

**M. L. KOMBA, J.:**

This is an appeal against both conviction and sentence meted against the appellants before the District Court of Serengeti (the trial court) in Economic Case No. 12 of 2021. Before the trial court, the trio appellants were stand charged with three counts. The **1<sup>st</sup> count** was Unlawful entry into the game reserve contrary to section 15 (1) and (2) of the Wildlife Conservation Act No. 5 of 2009, **the 2<sup>nd</sup> count** was Unlawful possession of weapons in game reserve contrary to section 17 (1) and (2) of the Wildlife Conservation Act No. 5 of 2009 read together with paragraph 14 of the first schedule to and section 57 (1) and 60 (2) of

Economic and Organized Crime Control Act [CAP 200 R.E 2019] and on the **3<sup>rd</sup> count** the appellants were charged with Unlawfull 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 Economic and Organized Crime Control Act [CAP 200 R.E 2019].

In brief, the prosecution evidence can be recounted as follows; that on 2<sup>nd</sup> March, 2021 at about 2200hrs at Mto Grumeti area into Ikorongo Grumeti Reserve with Serengeti District in Mara Region, PW1, PW2 together with other three while were on patrol, they successfully arrested the appellants into the Game Reserve. The appellants were also found in possession of two spears and one knife and the Government trophies to wit, fifteen pieces of fresh meat of Hippopotamus. The appellants were failed to prove that they had permit to enter into the area, to possess weapons into the area nor to possess government trophies.

After fill in the certificate of seizure, the appellants were taken to Mugumu Police Station where the case file no MUG/IR/552/2021 opened. Fifteen pieces fresh meat of Hippopotamus was identified and

valued to the tune of Tshs. 3,450,000/= by PW3 who was a Wildlife Officer. Later on, PW4, G. 4076 Detective Corporal Said who was investigator of the case, filled in the Inventory Form and took the appellants together with the Government trophies before the Magistrate who issued the disposal order as the exhibits were perishable in nature.

On the other hand, appellants entered their defence and the trio appellants were against the allegation pinned against them. But at the end of the trial, the trial court found the prosecution successfully proved their case beyond reasonable doubt and proceed on convicting and sentencing the appellants. The appellants were sentenced to serve 1 year jail term for the 1<sup>st</sup> and 2<sup>nd</sup> counts and in respect of the 3<sup>rd</sup> count the appellants were sentenced to 20 years imprisonment. The sentences were ordered to run concurrently.

As I alluded early above, the appellants were aggrieved by the decision of the trial court hence they prefer the present appeal. They fostered four grounds of appeal which can be summarized as follows;

- 1. That the trial Magistrate based on wrong evidence adduced.*
- 2. That the appellants were absent during disposal of Government trophies.*
- 3. That the trial Magistrate based on wrong exhibits admitted.*

*4. That the appellants were not given chance to call their witnesses in defence.*

During the hearing of the appeal, while connected from Musoma Prison via teleconference the appellants appeared solo, unrepresented, on the other hand Mr. Isihaka Ibrahim, the Learned State Attorney represented the respondent, Republic.

While I was reading the file in preparation of the hearing, I came across with the irregularity on the proceedings when issued the order of disposition of the Government trophies. I invited the parties to address on the issue first before dwelling into the other grounds of appeal.

Being the laymen, the appellants have no much to submit on the issue, they all prayed the court to adopt their grounds of appeal filed. On his part, Mr. Isihaka submitted that after he read the trial court record, he found that the appellants were asked as a group and their answer were recorded in reported speech during the proceedings of seeking the disposition order. He proceeded that the procedure was contrary to the law. Referring to the case of **Denis Deogratus vs Republic**, Criminal Appeal No. 362 of 2016 CAT at Tabora the counsel submitted that the court condemned such record and find that is a problem and the evidence was considered not to be from the accused.

It is Mr. Isihaka's opinion that the way forward is to expunge exhibit P4 (Inventory Form) and that by doing so, no evidence will remain to warrant the conviction of the appellants on the 3<sup>rd</sup> count. Regarding the 1<sup>st</sup> and 2<sup>nd</sup> counts Mr. Isihaka decided not to deal with them as the appellants have already completed the sentence against them. The learned State Attorney called upon this court to remind the Magistrates on the proper procedures of taking evidence.

After the parties' submission, I find the pertinent issue to deal with is whether the appellants were present and accorded the right to be heard when seeking the disposition order of the Government trophies.

There are two procedures of disposing of exhibit that is subject to speedy decay. The first procedure is provided for under section 101 of the WCA. Pursuant to the above cited provisions, the trial court may on its own motion or on application made by the prosecution, order that the trophy subject to speedy decay be disposed of.

The second procedure is provided for under paragraph 25 of the Police General Orders (PGO) which is reproduced hereunder for ease of reference:

*'Perishable exhibits which cannot easily be preserved until the case is heard, shall be brought before the Magistrate, together with the prisoner if any so that the Magistrate may note the*

*exhibits and order immediate disposal. Where possible, such exhibits should be photographed before disposal.'*

Regarding the evidence adduced by PW4, I find that the Government trophies in the case at hand was disposed under the PGO and not section 101 of the WCA. In the case of **Mohamed Juma @ Mpakama vs. Republic**, Criminal Appeal no. 385 of 2017, CAT (unreported), the Court of Appeal had this to say on the need of hearing the accused before disposing the exhibit: -

*"While the police investigator, Detective Corporal Salmon (PW4), was fully entitled to seek the disposal order from the primary court Magistrate, the resulting Inventory Form (exhibit PE3) cannot be proved against the appellant because he was not given the opportunity to be heard by the primary court Magistrate.*

Thus, the right to be heard by the accused (in this case the appellants) before issuing of the disposition order is of the mandatory. Looking in the case at hand, it is evidently that the appellants were taken before the Magistrate who issued the disposal order but on the issue that they were given the right to be heard, I can say there is a complexity. The proceedings shows that the Magistrate asked them and recorded their answer in a whole as a group. For easy reference I reproduced what transpired hereunder;

*'Date: 03.03.2021*

*Before: O. R. Kahyoza – RM*

*Acc Persons:*      1. Chacha Gitano Gongo  
                          2. Makena Mniko Giryago  
                          3. Zedekia Nyanguoka Magara } *All present*

*Acc Persons brought by – G 4076 DC/CPL SAID*

***Court*** – *The accused persons, are asked whether they were found in possession of the said Government Trophies mentioned in this inventory form within the Serengeti National Park.*

*Sgd: O. R. Kahyoza – RM*

*03/03/2021*

***All Accused Person (1<sup>st</sup>, 2<sup>nd</sup> & 3<sup>rd</sup>)*** – *It is true, we were found with the said Government Trophies mentioned in the inventory form within Serengeti National Park.*

*Sgd: 1<sup>st</sup> Acc Person*

*Sgd: 2<sup>nd</sup> Acc Person*

*Sgd: 3<sup>rd</sup> Acc Person*

***Court*** – *1<sup>st</sup>, 2<sup>nd</sup> & 3<sup>rd</sup> persons, admits to have been found in possession of the Government Trophies mentioned in this Inventory Form within Serengeti National Park*

*Sgd: O. R. Kahyoza – RM*

*03/03/2021'*

The proceedings shows that the appellants were responding to the Magistrate questions as the group. That is not the procedure. The Magistrate has to record the answer of each individual to know whether

each one admits for himself or not. The way the Magistrate recorded the answer we are not sure whether it is real all the appellants responded the same answer which amount to their admission.

Nevertheless, the Magistrate asked the appellants whether they have been found with the trophies in **Serengeti National Park** while the charge states that the appellants were found with the trophies **in the Game Reserve**. This alone portrayed that what happened during the issuance of the disposal order was not certain.

I am at one with Mr. Isihaka that the only way forward is to expunge exhibit P.E 4 which was illegally procured as I hereby do. See **Ngasa Tambu vs. The Republic (Criminal Appeal 168 of 2019) [2022] TZCA 455 (21 July 2022)**.

Once again as submitted by Mr. Isihaka, the remaining evidence are not sufficient to warrant the appellants' conviction on the 3<sup>rd</sup> count. Consequently, I hereby quashed the conviction and set aside the sentence imposed against the appellants regarding the 3<sup>rd</sup> count.

Since the appellants have already completed their sentences in respect of the 1<sup>st</sup> and 2<sup>nd</sup> counts, I order **CHACHA S/O GITANO @ GONGO, MAKENA S/O MNIKO @ GIRYAGO** and **ZEDEKIA S/O NYAGUOKA @ MAGARA** immediate released unless held on some other lawful cause.



It is so ordered.

**DATED** at **MUSOMA** this 26<sup>th</sup> day of July 2023.



*Mk*  
**M. L. KOMBA**  
**JUDGE**