IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MUSOMA DISTRICT REGISTRY

AT MUSOMA

CRIMINAL APPEAL NO. 147 OF 2021

(Arising from the decision of the District Court of Serengeti at Mugumu in Economic Case No. 39 of 2020)

BETWEEN

MATERA s/o MWITA @ MATERA.....1ST APPELLANT

MARWA s/o MWITA MALENDE.....2ND APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

A. A. MBAGWA, J.:

This appeal is against both conviction entered and sentence imposed by the District Court of Serengeti against the appellants in Economic Case No. 39 of 2020.

The appellants, Matera Mwita Matera (1st appellant) and Marwa Mwita Motende (2nd appellant) were arraigned before the trial court on a charge of three counts to wit, Unlawful Entry into the National Park contrary to 21(1)(a) and (2) and 29(1) of the National Parks Act, Unlawful Possession of Weapons in the National Park contrary to section 24(1)(b) and (2) of the National Parks Act and Unlawful Possession of Government Trophies contrary to section 86(1) and

(2)(c) (iii) of the Wildlife Conservation Act read together with paragraph 14 of the First Schedule to, and sections 57(1) and 60(2) of the Economic and Organised Crime Control Act.

It is was the contention of the prosecution that on 18th day of June, 2020 at around 08:00hrs the appellants were found at Daraja Mbili area within Serengeti National Park while in possession of government trophies to wit, carcasses of Thomson Gazelles and two weapons namely, one machete and knife.

Both appellants denied the charge hence the matter went through a full trial.

To prove the charge, the prosecution marshaled four witnesses namely, the arresting officers, Antony Cleophas (PW1) and Paulo Achieng (PW3), wildlife officer Wilbroad Vicent (PW2) and an investigator of the case E. 75 D/SGT Titus (PW4). Alongside, the prosecution produced four exhibits notably, seizure certificate (PE1), knife and machete (PE2), trophy valuation certificate (PE3) and inventory form (PE4).

PW1 and PW3 testified that on 18th day of June, 2020 at about 08:00hrs, while on their routine patrol, at Daraja Mbili area within

Serengeti National Park saw two persons walking while carrying some luggage. They thus pursued them and ultimately managed to arrest them. They found them in possession of knife and machete and carcasses of Thomson Gazelles. Upon probing them, PW1 testified that, the appellants replied that they had no permit to enter the National Park. Consequently, PW1 and PW3 along with other park rangers seized the said government trophies and weapons from the appellant. Thereafter they filled in the seized items in the seizure certificate (exhibit PE1) which was signed by both the arresting officers and the appellants. Subsequently, the appellants together with the seized items were surrendered to Mugumu Police Station for further investigation measures. PW1 tendered a seizure certificate (PE1) and the weapons i.e., one machete and knife (PE2)

Upon submission of the appellants and exhibits at Mugumu Police Station, a case file was opened and subsequently assigned to E. 75 D/SGT Titus PW4 for investigation. PW4 on 19th June, 2020 called Wilbroad Vicent (PW2) to identify and value the alleged trophy. It was the evidence of PW2 Wilbroad Vicent that identified the trophies to be carcasses of two Thomson Gazelles valued at Tanzanian shillings two million three hundred thousand (Tshs 2,300,000/=).

After identification and valuation of the government trophies, PW4 took the appellants and the trophies along with the inventory form before the magistrate for disposal order. Owing to the fact that the government trophies were subject to speedy decay, the magistrate had no hesitation to grant a disposal order by destruction. According to PW4 and the inventory order (PE4), the magistrate afforded the appellants an opportunity to be heard before he granted the disposal order. PW4 tendered in evidence the inventory order (exhibit PE4) whereas PW2 produced the trophy valuation certificate (exhibit PE3) to bolster their averments.

In defence, both appellants vehemently disputed the allegations leveled against them. The 1st appellant Matera Mwita Matera who stood as DW1 in the trial court testified that he and Marwa Mwita Motende (2nd appellant) were arrested on 17th day of June, 2020 at around 05:00hrs in farm which is near to Serengeti National Park. The appellant stated that they had gone to the farm to clean it and while continuing with the exercise, they were suddenly put under restraint, arrested and forcefully put in the car by the park rangers. Thereafter, they were taken to Mugumu Police Station and subsequently arraigned

in court. Similarly, the 2nd respondent Marwa Mwita Motende gave the same account in his testimony.

Having heard the evidence of both parties, the trial magistrate was satisfied that the prosecution case was proved beyond reasonable doubt in respect of the 1st and 3rd count. In a similar vein, she found that the 2nd count of unlawful possession of weapons within the National Park was not sufficiently proved. As such, she found the appellants guilty and convicted them of offences in the 1st and 3rd counts. Consequently, the appellants were sentenced two year imprisonment for the 1st count of unlawful entering into the National Park and twenty (20) year imprisonment for the 3rd count of unlawful possession of government trophies.

The appellants were dissatisfied with the verdict and sentence imposed on them hence they appealed to this court. In the petition of appeal, they raised several complaints all aimed at challenging the trial court for entering conviction against the appellants based on insufficient prosecution evidence.

When the appeal was called on for hearing, Mr. Nimrod Byamungu, learned State Attorney appeared for the Republic whilst the appellants prosecuted their appeal in person.

Mr. Byamungu supported the appeal in respect of 1st count whilst he resisted the appeal in relation to 3rd count

With regard to the complaint that CPL BENSON who investigated the case was not summoned to testify and instead of D/SGT TITUS came, the learned State Attorney submitted that the ground is devoid of merits stating that defence cannot decide who should testify for the prosecution. He continued that any witness is competent to testify if he is acquainted with facts of the case. He argued that D/SGT TITUS testified on relevant facts and the appellants did not cross examine him. The learned State Attorney thus prayed the complaint be dismissed

Regarding the attacks against disposal of government trophy, Mr. Byamungu submitted that it is not a requirement that an accused should be present when disposing of trophy. He said that accused is entitled to be present only when the court is issuing orders. The State Attorney clarified that, according to PW4, the appellants were present when the order to dispose the trophies was issued. Further, as per exhibit P4, the appellants signed on the inventory and more so, the appellants did not challenge exhibit P4 during cross examination, the learned State Attorney submitted.

Further, Mr. Byamungu submitted that the appellants were properly identified as they were arrested at about 08:00hrs. He continued that PW1 explained in detail on how he arrested them and tendered seizure certificate (exhibit P1) as well as one panga and knife (exhibit P2). Byamungu elaborated that PW1's testimony was sufficiently corroborated by PW3. The State Attorney referred to the case of **Goodluck vs the Republic**, 2006 TRL 263 and expounded that every witness is entitled to credence unless there are good reason not to do so.

In sum, Mr. Byamungu concluded that the prosecution case was proved beyond reasonable doubt in respect of the 3rd count hence he prayed the appeal to be dismissed in that regard.

The 1st appellant prayed the court to take into consideration their grounds of appeal and consequently allow the appeal by quashing conviction and sentence imposed on them. Similarly, the 2nd appellant lamented that he did not sign on the seizure certificate. He further submitted that the case was investigated by a person who did not come to testify.

On my part, having gone through the record and upon consideration of the grounds of appeal and submissions by the parties, the important

question for determination of this appeal is whether the trial court rightly convicted the appellant.

To start with the first count of unlawfully entry in the National Park, this should not detain the court anymore. Without further ado, I entirely agree with the learned State Attorney that the section 21 (1) (a) of the National Park Act under which the appellants were charged and convicted does not establish the offence of unlawfully entry in the National Park as the decision of the Court of Appeal in **Maduhu Nihandi @ Limbu vs the Republic,** Criminal Appeal No. 419 of 2017, CAT at Mwanza. As such, the trial magistrate erred in law to convict the appellants of nonexistent offence. The conviction and attendant sentence therefore are liable to be quashed and set aside.

As to the 3rd count of unlawful possession of government trophies, it is my considered findings that the offence was sufficiently proved. PW1 and PW3 clearly testified on how they arrested the appellants with the alleged trophies. Besides, PW1 tendered the certificate of seizure (PE1) which was also signed by the appellants. Further, PW2 Wilbroad Vicent, the wildlife officer, told the court that he identified the alleged trophies to be carcasses of two Thomson Gazelles valued at Tanzanian

shillings two million three hundred thousand (Tshs 2,300,000/=). Further, I took trouble to scan the inventory order (exhibit PE4) and noted that the procedures for disposal were fully complied with. According exhibit PE4, the appellants were given opportunity to be heard before the magistrate issued a disposal order. Moreso, the appellants admitted to have been found in possession of the alleged trophies and signed on the inventory form (at the back) to authenticate their presence. Upon scrutiny of the proceedings, there is nowhere the appellants cross examined the prosecution witnesses with regard to the disposal of the trophies or seizure of the trophies. This impliedly meant admission as not non cross examination on material issues is considered an admission of the same. See **Martin Misala vs the Republic,** Criminal Appeal No. 428 of 2016 and **George Maili Kemboge vs R,** Criminal Appeal No. 327 of 2013 CAT at Mwanza.

Further, having assessed the coherence of the evidence holistically, I do not see the reasons let alone good one to disbelieve the prosecution witnesses

On the above account, I am of unfeigned findings that the offence of unlawful possession of government trophies in the 3rd count was sufficiently proved against both appellants. I therefore uphold

conviction of unlawful possession of government trophies and the attendant sentence of twenty (20) imprisonment.

In the event, I quash conviction in respect of the 1st count and set aside its consequential sentence whilst I uphold conviction in respect of 3rd count of unlawful possession of government trophies and the sentence of twenty (20) year imprisonment.

That appeal is therefore partly allowed.

It is so ordered.

The right of appeal is explained.

A. A. Mbagwa

JUDGE

26/10/2022