IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MUSOMA SUB REGISTRY

AT MUSOMA

CRIMINAL APPEAL NO 161 OF 2021

(Arising from the District Court of Tatime at Tarime in Economic Case No 55 of 2020)

NYANGI WAITARA JOSHUA ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

JUDGMENT

31st May and 22nd June, 2022

F. H. MAHIMBALI, J.:

The appellant Nyangi Waitara Joshua was charged, convicted and sentenced to 20 years imprisonment by the District Court of Tarime together with his co-accused person (who is not party to this appeal) for three economic offences namely; Unlawful Entry into the National Park contrary to section 21 (1) (a), (2) and section 29(1) of the National Park Act, Cap 282 R.E 2019 as amended by the Written Laws (Miscellaneous Amendments) Act No.11 of 2003 for first count, Unlawful Possession of weapons in National Park contrary to section 24 (1) b and (2) of the National Park Act, Cap 282 of the R.E 2019, for the second count and Unlawful Possession of the Government Trophies contrary to section 86

(1) and (2) (iii) of the Wildlife Conservation Act, Act No. 05 of 2009 as amended by 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 2019 as amended by the Written Laws (Miscellaneous Amendments) Act No.3 of 2016 of the Economic and Organised Crime Control Act, Cap 200 R.E 2019 for the third count.

It was alleged by the prosecution that on the first count that on 30th day of August 2020 at Korongo la Gongóra area within Serengeti National Park Tarime District in Mara Region the appellant and his co-accused person entered a national park without permission of the Director thereof previously sought and obtained. As for the second count it was alleged that on the day and the place above mentioned the duo were found in unlawful possession of weapons to wit four animal trapping wires and one machete without permission and failed to satisfy an authorised officer that the same were intended to be used for the purpose other than hunting, killing, wounding or capturing of wild animals. In the third count it was alleged that on the date and place above mentioned the two accused persons were found in unlawful possession of one head fresh meat of wildebeest valued at US dollar 650

equivalent to Tanzania shillings 1,508,000/= the properties of the United Republic of Tanzania.

On the 9th day of November 2020, the DPP consented to the prosecution of the appellant and his co-accused pursuant to section 26(2) of the Economic and Organized Crime Control Act, Cap 200 R.E 2019 and GN 284 of 2014 and conferred the prosecution of the said charge before the jurisdiction of the subordinate court. As the accused persons pleaded not guilty to the charge, the prosecution summoned a total of four witnesses and tendered a total of four exhibits.

The testimony of PW1 and PW2 is almost identical that on 30th day of August 2020 at Korongo la Gongóra area within Serengeti National Park in Tarime District while on their normal patrol duties, they managed to arrest the appellant and his co-accused while being within the National Park unlawfully as they had no permit. Apart from being unlawfully present within the National Park, they had also found them being in unlawful possession of weapons within the National Park to wit: four trapping wires, one knife and one machete in which they had no permit and failed to satisfy an authorised officer that the same were intended to be used for purposes other than hunting. They also saw

them with one government trophy to wit: fresh head of wildebeest. PW2 then tendered certificate of seizure which was admitted as exhibit PE1.

PW3 – Police officer, testified how he investigated the police case file after being assigned where then interrogated PW1 and PW2 and tendered in court the alleged weapons, to wit: four trapping wires, one knife and one machete which were collectively admitted as exhibit PE2 of the case.

PW4 – Wildlife Officer, testified how he identified the said fresh head of wildebeest which is a wild animal and thus government trophy. As he is wildlife officer, the description of the said trophy was not an issue as he tried to provide the features of the said wildebeest in contrast to other animals. Apart from describing it, he valuated it and it was worthy 1,508,000/=. Thereafter, the said fresh head of wildebeest was sent to the nearest magistrate for a disposal order. The valuation report and disposal order were admitted as exhibits PE3 and PE4 respectively.

The appellant in his defense, testified that he was arrested by police on 24th August 2020 while on his way back from the market where he went to find banana and sent to police station for claims of

land disputes reported there by someone. He disputed being responsible for the offenses charged with. DW2 on the other hand claimed that on the 29th August 2020 as he was pastoring his animals near Gongóra area he was arrested by Tanapa officers and taken to their camp before being taken to Gibaso police station on the next day. He challenged the prosecution evidence that he was arrested not being with the appellant.

Upon hearing of the case, the trial court convicted the appellant and his co-accused person and sentenced them as stated above. Aggrieved by that decision, the appellant has preferred this current appeal based on five grounds of appeal, namely: -

1. *That, the trial magistrate erred in law and fact to find that the appellant participated in commission of the alleged matter in issues of while the same matter was formulated against me for interest of the prosecution.*
2. *That, the trial magistrate misdirected in her finding to hold that the appellant was found within the Serengeti National Park being in possession of government trophy and weapon while it was not true and the prosecution's witnesses testified false evidence and that there was no proof to the required standard.*

3. *That, the trial magistrate erred in law and fact by basing in evidence of incredible witnesses of the prosecution side who misled the Court in reaching wrong judgment.*

4. *That, the appellant is a poor, young person, helpless, who have no ability to hire an advocate for his case and the appellant believes that failure to engage the advocate for being poor person, the interest of justice was not done in favour of him.*

5. *That the trial magistrate failed to evaluate the entire evidence at hand, making critical analysis and scrutinize it, thus creates injustice.*

6. *That the prosecution failed to prove its case beyond reasonable.*

During the hearing of the case, the appellant who was self – represented had nothing more to add. He prayed that this Court to adopt his grounds of appeal to form part of his appeal submission. He thus, prayed that this Court to acquit him from the convicted charges.

In responding to the grounds of appeal filed, Mr. Frank Nchanilla learned state attorney for the respondent upon digest of the appellant's grounds of appeal, he conceded with the appeal on the first and second counts of appeal.

On the first count, he submitted that the appellant was wrongly charged with an offense of unlawful entry within the National Park contrary to section 21 (1) (a) (2) and 29 (1) of the National Park, Act Cap 282 as the said offence is not in existence. He was thus wrongly charged and consequently wrongly convicted with.

In the second count, Mr. Nchanilla submitted that the appellant was charged and convicted with the offence of unlawful possession of weapons within the National Park. He criticised the prosecution evidence as not establishing whether the point of arrest was within Serengeti National Park. As the point of arrest is said to be at Korongo La Gongóra which is within Serengeti National Park, it was expected that there should have been evidence to the effect that the said Korongo La Gongóra is within the coordinates of and boundaries of Serengeti National Park as per law.

On the other hand, he resisted the appeal on the third count in which he was convicted as charged for being in unlawful possession of government trophies. He thus argued five grounds of appeal jointly (1,2,3,4 and 6) as they relate to the question of facts. The fifth ground he argued it separately.

The controversy emanating from grounds 1, 2, 3, 4 and 6 that there is no evidence adduced for the proof of the charge. He countered the assertion on the premise that as per charged offence, unlawful possession of Government trophies has three criminal elements: Being in actual possession of the alleged trophy, whether the alleged trophy is really a trophy as per law and thirdly, whether there is permit. On these ingredients, he was of the firm view that prosecution's evidence is watertight. He said this relying on the testimony of PW1, PW2, PW4 and exhibits PE1, PE3 and PE4 as per typed proceedings of the trial court. Propounding on the first ingredient of being in unlawful possession of the alleged trophy, he submitted that the testimony of PW1 as reflected on pages 15-18 of the typed proceedings speak vast on that. The evidence of PW1 is collaborated by the evidence of PW2 which is reflected from pages 26 – 29 of the typed proceedings. That evidence then must be considered together with exhibit PE1 (Certificate of seizure) .

On the ingredient whether the appellant had permit of possessing the same, he had none when he was inquired to produce any.

Whether the alleged trophy was really government trophy as per law, Mr. Nchanilla while referring to pages 33-37 of the typed

proceedings of the trial court record, he was confident and bold that with the evidence of PW4, he was sure that the said ingredient was sufficiently made out. PW4 being wildlife officer testified how he is an expert in wildlife management affairs and that when he examined the said trophy (fresh head of an animal), he was satisfied that it was head of wildebeest and valued it at Tsh. 1,508,000/=. As it was perishable good/material, he prepared inventory in the presence of the said appellant and his co-accused. The appellant was very aware of it and in all the stages he was well involved. The said valuation report and inventory form and its disposal order were admitted as exhibits PE3 and PE4 respectively.

With this analysis, Mr. Nchanilla rested his submission, urging this court to acquit the appellant on the first and second counts of offences charged with but to maintain conviction and sentence (if need be) on the third count of the offence.

That was all about the appeal hearing. The vital question now is whether the appeal is meritorious. In reaching that end, I will make consideration of the parties' submissions for and against the appeal, what transpired at the trial court and whether the charge has been proved beyond reasonable doubt.

As regards the offences in the first and second counts, I agree with Mr. Nchanilla in his submission that the first count as per law is a non-existing offence. Thus, the appellant was wrong charged and convicted in a non-existing offence. With respect to the second count, I equally agree that the area in which the appellant is alleged to have been arrested has not been established to be within the coordinates and boundaries of Serengeti National Park as per law.

The next question for consideration is now whether the third offence of unlawful possession of government trophy has been sufficiently made out as per law and in consideration of the evidence in record. With this, Mr. Nchanilla is confident that the prosecution case has been proved. I will start with the sub issue whether there has been identification of the said trophy as per law. Mr. Njonga (PW4 at page 33 to 34 of the typed proceedings) is recorded to have testified that he is Wildlife Officer, he has Bachelor of Science in wildlife management from Sokoine University of Agriculture. That on 31st August 2020 while at office going with his activities, he received a call from OC-CID of Nyamwaga that he was required to attend Tarime District Court for identification of government trophy. When he went there, he says to have identified it as fresh head of wildebeest. How did he identify it, he

testified and I hereby quote it: *"I saw the said meat and I identified it as one head of wildebeest, it was fresh meat".* He then prepared valuation report and inventory form which he tendered in court as exhibits PE3 and PE4. The legal issue is one, he being an expert witness, was that description scientifically sufficient for the alleged trophy to be head of wildebeest? According to law, an expert witness is expected to furnish the court with necessary scientific criteria for testing the accuracy of their conclusions so as to enable the court to form its own independent judgment by application of these criteria to the facts proven in evidence (see **Rep V. Kerstin Cameron** [2003] T.L.R 85). I had expected that the PW4 to tell the distinctive features of the said alleged to be wildebeest and not domestic animal. With that, the evidence fell short of targe.

Secondly, as regards the manner the said alleged trophy was dealt with for it to be worth court's exhibit is tantamount to legal procedures. The exhibit PE4 is silent on the manner the appellant and his co-accused person were involved in the dealing of the said trophy. The inventory proceedings are silent on that. It is not establishing their involvement but just recorded their attendance before the magistrate. Other than this, there is nothing further exhibited by the said PE4 exhibit. What

then is the legal value of this? In the case of **Mohamed Juma Mpakama vs Republic,** Criminal appeal No 785 of 2019, CAT at Mtwara provided appropriate directives on what to be done by the magistrate for the procedure to be in legal compliance prior to the issuance of destruction order of the said inventory exhibit. The Court on this had this to say:

> *"According to paragraph 2 (a) of the Police General Orders (PGO), the Police Force recognizes the above duty to protect every exhibit, perishable or otherwise, which comes into their possession*:
>
> *2.(a) The police are responsible for each exhibit from the time it comes into the possession of the police, until such time as it is admitted by the Court in evidence, or returned to its owner, or otherwise disposed of according to instructions; [Emphasis is added].*
>
> *The above paragraph 25 envisages any nearest Magistrate, who may issue an order to dispose of perishable exhibit. This paragraph 25 in addition emphasizes the mandatory right of an accused (if he is in custody or out on police bail) to be present before the Magistrate and be heard. In the instant appeal, the appellant was not taken before the primary court magistrate and be heard before the magistrate issued the disposal order (exhibit PE3). While the police investigator, Detective Corporal Saimon (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. In addition, no photographs of the perishable Government trophies were taken as directed by the PGO".

My conclusion on evidential probity of exhibit PE4 in this case ultimately coincides with that of the appellant. Exhibits PE4 cannot be relied on to prove that the appellant was found in unlawful possession of Government trophies mentioned in the charge sheet. If the appropriate legal procedure is not followed then the said exhibit lacks evidentiary legal value and is subject to disregard, as I hereby do.

Since the respondent's counsel admits that with all the prosecution witnesses, none testified that the place of arrest was within the boundaries of Game Reserve. I entirely agree with him that for not mentioning/establishing the coordinate points where the appellant had been arrested is within the said protected area of Wildlife Management Area, then the offences of being present there in or being found with unlawful possession of weapons therein is wanting.

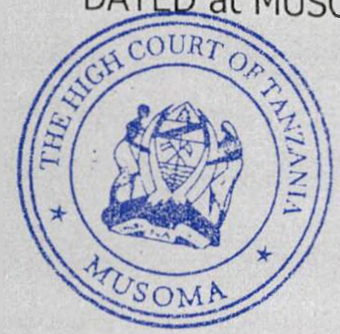
All said and done, this court holds that since all the three counts were not proved beyond reasonable doubt, this appeal is allowed and

the trial court's conviction on all charged offences is quashed, and the sentences meted out are set aside.

This court orders the immediate release of the appellant from custody unless he is lawfully held.

It is so ordered.

DATED at MUSOMA this 22nd day of June, 2022.



F.H. Mahimbali

Judge

Court: The judgment read through teleconference placed in the offices of National prosecution service at Musoma, in absence of the appellant while respondent being represented by Agma Haule, State Attorney.

T. J. Marwa, RM

Ag. Deputy Registrar

22/06/2022

DELIVERED THIS 22nd day of June, 2022 in chamber court, Right of appeal explained.

T. J. Marwa, RM

Ag. Deputy Registrar

22/06/2022