IN THE COURT OF APPEAL OF TANZANIA
AT MUSOMA

(CORAM: WAMBALI, J.A., KITUSI, J.A. And MASHAKA, J.A.)

CRIMINAL APPEAL NO. 518 OF 2019

SENSO MASWI @ MWITA ..... 1ST APPELLANT
WAMBURA s/o MARWA @ WAMBURA ..... 2ND APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Judgment of Resident Magistrate's Court of Musoma (Extended Jurisdiction) at Musoma)

(W. S. Ng'umbu, RM EXT. JUR.)

dated the 8th day of October, 2019
in
Criminal Appeal No. 21 of 2019

JUDGMENT OF THE COURT

26th October & 3rd November, 2021

KITUSI, J.A.:

Under section 15(1) and (2) of the Wildlife Conservation Act No. 5 of 2009 (WCA), it is an offence to be in a game reserve without a permit. The appellants were charged with that offence before the District Court of Serengeti at Mugumu where it was alleged that on 17/11/2018 they were found at 'Mashine ya Zamani' area within Grumeti Game Reserve without a permit. That was in the first count.

In the second and third counts, the appellants were charged for offences they allegedly committed while in that game reserve. Therefore, in the second count they were charged that they were found in unlawful possession of weapons in a game reserve, contrary to section 17(1) and (2) of the WCA read together with paragraph 14(d) of the first schedule to the Economic and Organized Crime Control Act [Cap. 200 R.E. 2002, now R.E 2019] (The EOCCA) as amended by the Written Laws (Miscellaneous Amendments) Act No. 3 of 2016. It was alleged in respect of the second count that the appellants were found in possession of a "panga" and a knife while in Grumeti Game Reserve, and failed to satisfy the responsible officers that the weapons were not intended for any ill motive such as hunting or wounding animals.

In the third count the appellants were alleged to have been found in possession of a rib and a head being fresh parts of a wildebeest, valued at Tshs. 1,430,000/=, the property of the United Republic of Tanzania. In that connection, they were charged under section 86(1) and (2) (c) (iii) of the WCA as amended by the Written Laws (Miscellaneous Amendments) Act No. 2 of 2016 read together with paragraph 14 of the first schedule to the EOCCA as amended

by the Written Laws (Miscellaneous Amendments) Act No. 3 of 2016.

The District Court found the appellants guilty and convicted them with all three counts on the basis of the following evidence: -

Jumapili Julius Nyamjoya (PW1) and Seleman Magesa Kinoko (PW2) were game scouts working with Grumeti Game Reserve. On 17/11/2018 at around 17:00 hours, PW1 and PW2 while on patrol within the reserve, they saw the two appellants carrying something. Upon arresting them, they found the appellants to be in possession of weapons, to wit, a panga and a knife as well as parts of a dead wildebeest, that is a fresh head and ribs. They took them to Mugumu police station along with the parts of the wildebeest.

On 18/11/2018 DC Stephen Christian (PW4) who was assigned to investigate the case, interrogated the appellants concerning the alleged offences and summoned a Wildlife Warden known as Wilbroad Vicent (PW3) to identify the fresh game meat and value it. PW3 confirmed the meat to be of wildebeest and valued it at USD 650 being the value for one wildebeest, equivalent to Tshs. 1,430,000. He prepared a Trophy Valuation Certificate (exhibit P.E. 2).

An Inventory Form was then prepared after which a magistrate's order of disposal of the fresh meat was obtained, so as to avoid it decaying. At the instance of PW4, the Inventory Form representing the game meat, was admitted in court as exhibit P.E. 3.

We should perhaps mention at this stage that the first appellant took a passive participation in the trial. Earlier as the trial magistrate was preparing to record evidence of the first prosecution witness in the trial, the first appellant moved him to recuse himself, for the reason that he had no confidence in him. The learned trial magistrate declined because, he said, the first appellant had not assigned any ground justifying his recusal.

Thereafter, trial proceeded by recording the evidence of the four prosecution witnesses as referred to above. When eventually the prosecution closed its case, and the trial court addressed the appellants on their rights to mount respective defences and call witnesses or to remain silent, the first appellant elected to remain silent.

The public prosecutor was invited, and he exercised the right, to comment on the first appellant's decision to remain silent, as

section 231(3) of the Criminal Procedure Act, [Cap. 20 R.E. 2002] (The CPA) requires. His brief submission was that the first appellant's silence amounted to him not challenging the evidence adduced by the prosecution as to his guilt.

The second appellant made his defence and told his story of how he found himself in the hands of game scouts on 17/11/2018. He stated that he had gone to Bondungy Village to attend a wedding ceremony on 16/11/2018. On 17/11/2018 when he was on his way home from the wedding, he ran into the game scouts. The game scouts asked him where he was coming from, and he told them that he was from a wedding. However, appearing to be annoyed or disapproving, they asked him why he was using the road which they found him using. Thus, they arrested him.

Going by that story, the second appellant's line of defence was that he was not within the game reserve nor was he found in possession of the items mentioned in the second and third counts. He also raised an issue of contradiction in the evidence of PW2 who said that they were in possession of one Panga and one knife while PW4 said they were in possession of two pangas and one knife.

The learned trial Resident Magistrate accepted the evidence of PW1, PW2, PW3 and PW4 as representing the truth of the matter and that the second appellant's defence did not raise any reasonable doubt. He convicted the appellants in all three counts and sentenced them to 1 year for the first count, 1 year for the second count and 20 years for the third count.

The appellants' separate appeals were consolidated and heard by Hon. W. S. Ngúmbu, a Resident Magistrate with extended jurisdiction hereafter, RM (EJ). The appeals were unsuccessful because the learned RM (EJ) took the view that the decision of the trial court was based on the credibility of the prosecution witnesses, a finding he said, he could not fault. Therefore, the first appellate court confirmed the convictions and sentences.

Aggrieved by that decision, the appellants have appealed to the Court by presenting separate memoranda of appeal, although the contents are identical, including a complaint of denial of the right to be heard, featuring as ground 5 in each.

However, at the hearing of the appeal which the appellants participated by digital connection from Musoma Prison, the respondent Republic supported the appeal on ground of some

technical but fundamental defects which, according to the respondent's position, weaken the prosecution's ability to prove the case against the appellants beyond reasonable doubt. Mr. Kainunura Anesius, learned Senior State Attorney, Messrs. Mafuru Moses and Frank Nchanila, learned State Attorneys, represented the respondent Republic. Mr. Mafuru addressed us on behalf of the team, pointing out two major infractions.

The first error is in relation to the exhibits that were tendered in support of the prosecution case. First, he said, they were tendered by the public prosecutor as opposed to a witness. Second, after admission, the documentary exhibits were not read out for the appellants to appreciate the contents. He mentioned the exhibits that were tendered by the public prosecutor as the knife and machete, the Trophy Valuation Certificate and the Inventory Form. The learned State Attorney submitted, logically we think, that a public prosecutor may only tender exhibits during presentation of facts after an accused pleads guilty to a charge or charges or, during Preliminary Hearing when a fact is not disputed. He cited the case of **Athuman Almas Rajabu vs Republic,** Criminal Appeal No. 416 of 2019 to support his argument.

Mr. Mafuru submitted also that the Trophy valuation certificate that was tendered as exhibit P.E.2 was wrongly acted upon, because it was not thereafter read as required. The case of **Robinson Mwanjisi and 3 Others vs Republic** [2003] T.L.R 218 was referred to.

We agree with the learned State Attorney because we have repeatedly held a similar position in other cases. See **Nyakwama Ondare @ Okware vs Republic,** Criminal Appeal No. 507 of 2019; **DPP vs Festo Emmanuel Msangaleli & Another,** Criminal Appeal No. 62 of 2017, **Steven Salvatory vs Republic,** Criminal Appeal No. 275 of 2018 and **Willy Kitinyi @ Marwa vs Republic,** Criminal Appeal No. 511 of 2019 (all unreported). The rationale for these principles is easy to see, that a Public Prosecutor who tenders an exhibit cannot be subjected to cross-examination on it, and a documentary exhibit which is not read over after admission leaves the accused in a disadvantage of not knowing its contents, thus denying him or her fair hearing. All these exhibits are therefore liable to be expunged.

The second infraction which is equally grave, is the preparation of the Inventory Form without the participation of the

appellants. Citing the case of **Mohamed Juma @ Mpakama vs Republic,** Criminal Appeal No. 385 of 2017 (unreported), Mr. Mafuru urged us to expunge it because by denying the appellants the right to participate, they denied them the right to be heard. We have dealt with a case with similar circumstances recently in **Dogo Marwa Sigana & Another vs Republic,** Criminal Appeal No. 512 of 2019 and **Willy Kitinyi @ Marwa vs Republic** (supra) (both unreported), so we agree with Mr. Mafuru that the Inventory Form is liable to be expunged and we accordingly expunge it. We note that the issue of the exhibits was also raised by the appellants as ground 2 of appeal, as follows: -

> *"2. That the trial court and the first appellate court erred in law and fact for admitting (the) wrong exhibit created by game rangers to facilitate conviction and sentence of the appellants (s)."*

With the inventory form expunged for contravening the procedure under paragraph 25 of the PGO as held in the case of **Mohamed Juma @ Mpakama** (supra), it means the game meat, the subject of the third count, was not tendered in evidence, and that cripples the prosecution case. On the basis of ground 2 above

to which the respondent Republic has conceded, we are allowing the appeal in respect of the 2nd and 3rd counts, because the convictions were based on, among other pieces of evidence, the wrongly tendered exhibits.

Regarding the conviction of the appellants on the first count, Mr. Mafuru threw in the towel, and submitted that the prosecution did not prove the charge against the appellant as per the Court's recent decisions on the point. The learned State Attorney must have had in mind our decision in **Dogo Marwa Sigana & Another** (supra). In that decision we said;

> *"After reading through the first schedule, which provides the outlines of the boundaries of the Serengeti National Park, Mr. Mayenga conceded the Mlimani Soroi area where Park rangers supposedly arrested the appellants, does not appear under the First Schedule marking the boundaries of the National Park.* ***We need not emphasize that the prosecution evidence on record, did not prove beyond reasonable doubt that the Park rangers arrested the appellants within the statutory boundaries*** *of the Serengeti National Park." (emphasis supplied)*

That holding applies to this case, in our view, because considering that the second appellant said he was on a road heading home from another village where he had gone to attend a wedding, and he said, the Park rangers appear to have taken issue with his mere use of the road, there was need of proof that the road is within the game reserve. However, there is, as it were, no evidence by the prosecution to prove that.

Consequently, we have no proof before us that the conviction on the first count was well founded. This, in a way, was also raised as a ground of appeal because the first ground of appeal faulted the trial and first appellate courts for entering and sustaining convictions while the prosecution did not prove the case against the appellants beyond reasonable doubt. We find merit in that ground.

Before we conclude, we feel compelled to make some observations regarding the first appellant's conduct during the hearing before the trial court. Much as justice is rooted in confidence, that does not include a litigant demanding change of forum, for unknown reasons as in this case, or simply because he has disliked the magistrate who has conduct of the proceedings. To yield to such demands would be an abdication of duty. We reiterate

the Court's firm statement on this, made in the case of **Registered Trustees of Social Action Trust Fund and Another vs Happy Sausages Limited and 11 Others** [2004] T.L.R 264. The Court made the following statement at page 273: -

> *" It is our considered view that it would be an abdication of judicial function and an encouragement of spurious applications for a judicial officer to adopt the approach that he/she should disqualify himself/herself whenever requested to do so on application of one of the parties on grounds of possible appearance of bias. A judicial officer should not automatically stand aside whenever requested to do so".*

Therefore, if not for the defects that have been pointed out by the learned State Attorney rendering the prosecution case weak, the first appellant's complaint in ground 5 of appeal, that he was denied the right to a hearing, would not have carried weight, because that was a self-inflicted injury.

In the end, as the prosecution case was built on wrongly admitted exhibits, and because there was lack of proof that the appellants were within the Grumeti Game Reserve, the trial court wrongly convicted and sentenced the appellants, and the first

appellate court wrongly upheld the decision. We allow the appeal, quash the convictions and set aside the sentences. We order the appellants' immediate release unless they are lawfully held for some other causes.

DATED at **MUSOMA** this 2nd day of November, 2021.

F. L. K. WAMBALI
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

L. L. MASHAKA
JUSTICE OF APPEAL

The Judgment delivered this 3rd day of November, 2021 in the Presence of Mr. Frank Nchanila, learned State Attorney for the Respondent/Republic and the Appellants who appeared remotely via Video link from Musoma Prison is hereby certified as a true copy of the original.

THE COURT OF APPEAL OF TANZANIA

F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL