IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF MUSOMA

AT MUSOMA

CONSOLIDATED APPEALS NO 03,07 AND 08 OF 2020

(Originating from Economic case No 141 of 2018 of the District Court of Serengeti at Mugumu)

1. EMMANUEL CHACHA

2. SIMON NYAMHANGA @ MERENGO .....APPELLANTS

3. JUMA MARWA MAHENDE

Versus

REPUBLIC .... RESPONDENT

JUDGMENT

29th June & 17th July, 2020

Kahyoza, J.

Five persons namely **Mwita Keryoba @ Chacha, Juma Marwa @ Mahende, Simon Nyamhanga @ Merengo, Petro Mwita Chacha** and **Emmanuel s/o Chacha** were arraigned for **entering into the National Park unlawfully,** being in unlawful possession of the weapons in the National Park and for possessing the government trophy unlawfully. The accused persons denied that charges.

The prosecution summoned four witnesses to prove the case against the accused persons. The trial court found the accused persons guilty as charged, convicted them, and imposed a custodial sentence. Two of the

accused persons were convicted *in absentia.* The three appellants who were in convicted in their presence appealed to this Court alleging that the court did not afford them a chance to call witnesses; it convicted them on iniquitous exhibits, there was no independence witness and that the court conducted the case without jurisdiction as the Director of public Prosecutions did not by certificate confer it jurisdiction.

The District Court of Serengeti at Mugumu found **Emmanuel s/o Chacha @ Warioba, Simon Nyamhanga, Juma Marwa** and two other persons guilty and convicted them with three counts to wit; **one,** Unlawful Entry into the National Park c/s 21(1)(a), (2) and 29(1) of the National Park Act [CAP. 282 R,E 2002] as amended by the Act No 11 of 2003; **two,** Unlawful Possession of weapons in the National Park c/s 24 (1)(b) and (2) of the National Park Act [CAP. 282 R,E 2002]; and **three,** Unlawful Possession of Government Trophies, contrary to 86 (1) and (2) (c)(iii) of the Wildlife Conservation Act, No. 5 of 2009 (as amended) read together with paragraph 14 of the First Schedule to the Economic and Organized Crime Control Act [Cap. 200, R.E 2002] as amended by act No 3 of 2016.

The court sentenced the appellants and two others convicts to serve a custodial sentence of one year for each offence in the first and second counts and twenty years for the offence in the third count. It ordered the sentences to run concurrently.

Aggrieved, **Emmanuel s/o Chacha @ Warioba, Simon Nyamhanga** and **Juma Marwa** appealed to this court with four the similar grounds of appeal rising the following issues:-

1. Were the appellants denied an opportunity to call witnesses?
2. Were the exhibits tendered before the trial court irrelevant or iniquitous?
3. Were the appellants wrongly convicted in the absence of an independent witness?
4. Did the DPP confer jurisdiction to the trial court to try an economic offence?

The appellants fended for themselves and Mr. Temba learned state attorney represented the Respondent. The appellant pleaded to this court to adopt their grounds of appeal and to do justice to them by finding them not guilty. The Respondent's state attorney did not support the appeal. I will refer to his submission while responding to the issues. I will commence with the threshold issue.

Did the DPP confer jurisdiction to the trial court to try an economic offence?

It is undisputed fact the appellants and other convicts were charged with non-economic and economic offences. There is also no dispute that where a person charged with non-economic and economic offences, a subordinate has no jurisdiction to try such a case unless the Director Public Prosecutions confers jurisdiction to that court. To confer jurisdiction to a subordinate, the Director Public Prosecution has to issue a certificate under section 12(4) of the **Economic and Organized Crime Act**, [Cap. 200 R.E. 2019], (the **EOCA**) and not otherwise. See the case of **Warioba Yuda V. R Criminal Appeal No. CAT (unreported**). Thus, without DPP properly issuing a certificate and consent to a subordinate court, that court

has no jurisdiction to hear and determined an economic offence.

The appellants contended that the trial court tried the case without consent and certificate from the DPP. Mr. Temba submitted that a consent and certificate were tendered to the court as shown at page 8 of the proceedings.

I perused the both the typed and hand written proceedings, which depict that the DPP issued and filed certificate and consent on the 24th April, 2019 before the trial commenced. The certificate was issued under section 12(4) of the **EOCA**. Thus, the trial court had jurisdiction to try the both non-economic and economic offences as the appellants stood charged. I dismiss the fifth ground of appeal.

Were the appellants denied an opportunity to call witnesses?

The appellants complained that the trial court did not give them an opportunity to call witnesses. Mr Temba, learned state attorney refuted the contention that the court did not give the appellants an opportunity key witnesses.

It is evident from the record that the trial court addressed the appellants in terms of section 231 of the **Criminal Procedure Act**, [Cap 20 R.E 2019] (the **CPA**). The section requires a trial magistrate to inform the accused his right to defend himself on oath or affirmation or otherwise, his right to call witness. The court has to ask the accused to reply and record his response. It states-

231.-(1) At the close of the evidence in support of the charge, if it appears to the court that a case is made against the accused person

sufficiently to require him to make a defence either in relation to the offence with which he is charge or in relation to any other offence of which, under the provisions of sections 300 to 309 of this Act, he is liable to be convicted the court shall again explain the substance of the charge to the accused and inform him of his right-

(a) to give evidence whether or not on oath or affirmation, on his own behalf; and The Criminal Procedure Act [CAP. 20 R.E. 2019] 148.

(b) to call witness in his defence,

and shall then ask the accused person or his advocate if it is intended to exercise any of the above rights and shall record the answer; and the court shall then call on the accused person to enter on his defence save where the accused person does not wish to exercise any of those rights.

The trial court in compliance to section 231 of the **CPA**, addressed the appellants in the following words-

*"**Court**: The accused persons are well addressed in terms of s. 231 of the Criminal Procedure Act and asked to reply thereto."*

The issue is whether by such short address the trial court did comply with the requirement of the law above cited. To answer that, I further read the record which shows that the accused persons replied that –

*"**1st Accused Reply**: I will give evidence on oath"*

From the accused person's reply, I am convinced that the trial court address the appellants their rights as provided by section 231 of the **CPA**. I am not able to buy the appellants contention that they were denied the right to call their key witnesses. The court notified them their right to call the witness and they did not opt to call any. The appellants' contention raised the issue whether the trial did comply with the requirement of section 231 of the **CPA**. The fact that the appellants replied that they will

testify on oath is an indication that the trial court did address the appellants regarding their rights under section 231 of the **CPA**.

The Court of Appeal faced with the whether or not it suffices for the **trial court to simply write section 231 of the CPA complied with.** It held that **it was enough that the trial court complied with the law and that failure to strictly comply with section** 231 of the **CPA did not prejudice the appellants**. It stated in **Julius Justine and 4 others v. Republic**, Criminal Appeal No. 155 of 2005 (CAT unreported)-

> *"The appellants complained of noncompliance with section 230 and 231. But on examination of the trial court record, the Court was satisfied that the magistrate ruled that all of the accused persons had a case to answer as they gave evidence in defence not in a rush without any complaint and they all told the court that they had no witnesses to call. In conclusion, the Court stated:*
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> > *"That being the case then, the appellants were not denied their inalienable right to a full hearing and fair trial. For this reason, we accept; ..... that* ***the omission to strictly comply with section 231 (1) of the CPA did not prejudice the appellants*** *in any way. We accordingly find no merit in this particular ground of appeal and dismiss it"*

I am of the opinion that in this case, the omission by the trial court to write in detail what it addressed the appellants did not prejudice the appellants. That notwithstanding, I wish to remind the magistrates the direction of the Court of Appeal in **Abdallah Kondo v R** Criminal Appeal

No. 322/2015 (CAT Unreported) **to record what the accused is informed and his answer to it.** It held-

> *"Given the above legal position, it is our view that strict compliance with the above provision of the law requires the trial magistrate to record what the accused is informed and his answer to it. The record should show this or something similar in substance with this.*
>
> *"**Court**: Accused is informed of his right to enter defence on oath, affirmation or not and if he has witnesses to call in defence.*
>
> ***Accused response**: ... '[record what the accused says)."*

In the upshot, I find that the trial court did not deny the appellant a chance to call witnesses rather the appellants did not indicate that they had witnesses to call, after the court addressed them as per section 231 of the **CPA.** I dismiss the first ground of appeal.

Were the exhibits tendered before the trial court irrelevant or iniquitous?

The appellants contended that the trial court admitted wrong exhibits which did not show how the appellants participated in the commission of the offence. They added that the court relied on such exhibits to convict them.

On the other hand, Mr. Temba for the Republic conceded to the second ground of appeal. He submitted that the exhibits were not properly

admitted. He submitted that the role of a prosecutor was to prosecute the case and not tender exhibits. He averred that the prosecutor in the instanct case did tender the exhibits. For reasons, he prayed the exhibits to be expunged from the records. Also, he prayed the evidence tendered to remain be uphold and the Court to find it sufficient to sustain the appellants' conviction. He referred the Court to the case of **Seleman Moses Sotel V Republic,** Criminal Appeal No 385 of 2018 at page 12.

I agree with the state attorney that the role of prosecutor is to prosecute cases and not to tender exhibits or to be a witness in the case which he or she is prosecuting. The Court of Appeal in **Thomas Ernest Msungu @ Nyoka Mkenya V R,** Criminal Appeal No 78 of 2012 (Unreported) stated as follows-

> *"A prosecutor cannot assume the role of a prosecutor and witness at the same time. With respect, that was wrong because in the process the prosecutor was not the sort o f a witness who could be capable of examination upon oath or affirmation in terms of section 98(1) of the Criminal Procedure Act As it is, since the prosecutor was not a witness he could not be examined."*

It is on that bases I expunge all the exhibits from the record on the ground that the same were tendered by the prosecutor instead of the witnesses. The issue is whether the irregularity had any impact on the oral evidence. My answer is negative. The exhibits are tendered to had weight to the oral evidence. Depending on the nature and circumstances of the commission of the offence, there are cases which can be proved without

exhibits.

In the instant case, the appellants were charged in the second count with the offence of unlawful possession of weapons in the National Park. Sabo Helbert (**Pw1**) and Deogratius Richard (**Pw2**) deposed that the found the appellant and other two people in Serengeti National with weapons; to wit one knife, two panga and three animal trapping wires. It is my firm view that the offence in the second count cannot be proved by oral evidence without tendering the weapons (exhibits). I therefore, find that the offence in the second count has been affected by expunging Exp. P.1. I find the appellants not guilty with the offence in the second count.

The appellants stood charged further, with the offence of unlawful entry in the National Park. This offence is not affected by expunging the exhibit. It is such offence which can be proved by oral evidence. Sabo Helbert (**Pw1**) and Deogratius Richard (**Pw2**), both park rangers deposed that on the 6th December, 2018 while on the routine patrol at Korongo la Machochwe saw five people. They arrested, found them in possession of the government trophy; to wit, three hind limbs/legs wildebeest. They testified that they took the culprit to with exhibits to Mugumu police station. They deposed further that the five people did produce neither a permit to enter into the National Park nor a permit to possesses the government trophy.

The appellant denied to have entered into the National Park. **Juma,** the third appellant deposed that his blind cattle went missing. He went out to look for it. While in search of his missing cow near the National Park

borders, park rangers approached him and arrested him. The first and the second appellants deposed that they responded to the call for help from the third appellant.

In find the prosecution's evidence more reliable. The appellants did not cross-examine the prosecution witnesses. It is settled that **a party who fails to cross examine a witness on certain matter is deemed to have accepted that matter and will be estopped from asking the trial court to disbelieve what the witness said**. See **Daniel Ruhere v. Republic** Criminal Appeal No. 501/2007, **Nyerere Nyauge v. R** Criminal Appeal No. 67/2010 and **George Maili Kemboge v. R** Criminal Appeal No. 327/2013, a few to mention.

In addition to the above, the appellant did not tell this Court or the trial court the reason(s) for the prosecution witnesses to fabricate evidence against them.

I have no flick of doubt that the appellants and other persons who jumped bail unlawfully entered into the National Park.

I also find that the fact that I expunged the trophy valuation Certificate (Exh. P.2) did not affect the evidence tendered in respect of the third count. **Wilbrod Vicent (Pw3)**'s evidence is sufficient to prove that the appellants were found in possession of the trophy, to wit, three hind limbs/legs wildebeest. He identified it by the colour of its skin, which he described it as grey to dark brown. He stated that the value one wildebeest was USD 600. The appellants were found with three hind limbs/legs, hence they killed two wildebeest the value of which is USD 1200, which was equivalent to Tzs. 2,600,000/=. The absence of the trophy valuation report

did not affect **Wilbrod Vicent (Pw3)**'s evidence.

It is settled that, even in the circumstance where a certificate of seizure is required but is not tendered, the court can still convict if, satisfied that there is evidence on the record to establish that the accused was in possession of the items, which ought to have been entered in the certificate of seizure. See **Issa Hassan Uki v. R** Cr. Appeal No. 129/2017 (CAT unreported) at Page 13 – 16. In that case, the court expunged the certificate of seizure and made a finding that evidence on record was quite sufficient to cover the contents of the expunged exhibit.

Eventually, I partly uphold the second ground of appeal with the effect as shown above.

Were the appellants wrongly convicted in the absence of an independent witness?

The appellant contended in the third ground of appeal that the trial court erred in law and in fact to convict them without evidence of an independent witness. There is no doubt that the prosecution's principal witnesses were park rangers. There was no independent witness.

This complaint is misconceived. As stated by Mr. Temba, the appellants were found within the National Park as per the evidence of Sabo Helbert (**Pw1**) and Deogratius Richard (**Pw2**) at 23.00hrs. It is unlikely to find independent witnesses in the National Park at that time. Not only that but also, like the state attorney, I did not find any reason not to trust the prosecution witnesses. It trite law that witnesses must be trusted unless, there is a reason to question their credibility The **Goodluck Kyando v. R.,**

[2006] TLR 363 and in **Edison Simon Mwombeki v. R.,** Cr. Appeal. No. 94/2016 (the Court of Appeal stated that-

> *"Every witness is entitled to credence and must be believed and his testimony accepted unless there are good and cogent reasons for not believing a witness."*

Sabo Helbert (**Pw1**) and Deogratius Richard (**Pw2**) testified consistently that they saw five people in the national park arrested them whilst in possession of the government trophy and took them to police station. I had no reason not trust their evidence.

I find the prosecution witnesses credible and the trial court was right to rely on their evidence to convict the accused persons. Lack of an independent witness did not create any doubt in the prosecution's evidence.

In the upshot, I uphold the conviction of the appellants for offence of unlawful entry into the National Park c/s 21(1)(a), (2) and 29(1) of the National Park Act [CAP. 282 R.E. 2002] and Unlawful Possession of Government Trophies, contrary to 86 (1) and (2) (c)(iii) of the Wildlife Conservation Act, No. 5 of 2009 (as amended) read together with paragraph 14 of the First Schedule to the Economic and Organized Crime Control Act [Cap. 200, R.E 2002] as amended by act No 3 of 2016.

For the reasons stated above, I set aside the conviction for offence of unlawful possession of weapons in the National Park c/s 24 (1)(b) and (2) of the National Park Act [CAP. 282 R,E 2002].

I now consider the sentence imposed. The appellants were sentenced to one year in respect of the offence in the first court of

unlawful entry into the National Park c/s 21(1)(a), (2) and 29(1) of the National Park Act [CAP. 282 R.E. 2002]. I have no reason to interfere with that sentence.

As to the sentence imposed for the offence in the second count I quashed the conviction and aside sentence. There is no sentence to consider.

The appellants were sentenced to serve a custodial sentence of 20 years without an option of to pay fine for the offence of unlawful possession of Government Trophies, contrary to 86 (1) and (2) (c)(iii) of the Wildlife Conservation Act, No. 5 of 2009 (as amended) read together with paragraph 14 of the First Schedule to the Economic and Organized Crime Control Act [Cap. 200, R.E 2002] as amended by act No 3 of 2016. Section 60(2) of the Economic and Organized Crime Control Act. [Cap. 200 R.E. 2019] provides the sentence to economic offence to be not less than 20 years. It states-

> (2) *Notwithstanding provision of a different penalty under any other law and subject to subsection (7), a person convicted of corruption or economic offence shall be liable to imprisonment for a term of not less than twenty years but not exceeding thirty years, or to both such imprisonment and any other penal measure provided for under this Act;*
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> *Provided that, where the law imposes penal measures greater than those provided by this Act, the Court shall impose such sentence.*

Also section 86 (1) and (2) (c)(iii) of the Wildlife Conservation Act, No. 5 of

2009 provides a similar sentence. It states-

> *86 (2) A person who contravenes any of the provisions of this section commits an offence and shall be liable on conviction-*
>
> *(C) in any other case*
> *(i)....*
> *(ii) where the value of the trophy which is the subject matter of the charge exceeds one million shillings, to imprisonment for a term of not less than twenty years but not exceeding thirty years and the court may, in addition thereto, impose a fine not exceeding five million shillings or ten times the value of the trophy, whichever is larger amount.*

I am of the firm view that the sentence imposed is a just sentence. I have no reason to interfere. I therefore, dismiss the appeal against sentence save for the sentence imposed regarding the second count which I have set aside. I order the sentences to run concurrently as previously ordered.

Before I pen off, let me state that before the trial court were five accused persons. It did not acquit any of them but it convicted four instead of five accused persons. I did not see if there was a reason of not convicting all them. It is out of slip of a pen, that one of the accused persons was not convicted. I step into the shoes of the trial court and convict the fifth accused person, **Mwita Keryoba Chacha** with the offences unlawful entry into the National Park c/s 21(1)(a), (2) and 29(1) of the National Park Act [CAP. 282 R.E. 2002] and unlawful Possession of Government Trophies, contrary to 86 (1) and (2) (c)(iii) of the Wildlife Conservation Act, No. 5 of 2009 and unlawful Possession of Government Trophies, contrary to 86 (1) and (2) (c)(iii) of the Wildlife Conservation

Act, No. 5 of 2009 (as amended) read together with paragraph 14 of the First Schedule to the Economic and Organized Crime Control Act [Cap. 200, R.E 2002] as amended by act No 3 of 201. **Mwita Keryoba Chacha** jumped bail before he gave his defence. I convict him *in absentia* and sentence him to serve, upon his arrest, similar sentences as the rest of the accused persons, subject to his rights under section 226 of the **CPA**.

It is ordered accordingly.

J. R. Kahyoza

JUDGE

17/7/2020

Court: Judgment delivered in the presence the appellants and Mr. Temba, State Attorney via video link. Right to further appeal explained. B/C Catherine Tenga present.

THE HIGH COURT OF TANZANIA
MUSOMA

J. R. Kahyoza,
Judge
17/7/2020