IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

CRIMINAL APPEAL NO. 75 OF 2021

(Originating from Criminal Case No. 14 of 2017 of Same District Court at Same)

ALLY JUMA @ OMARY.....1st APPELLANT

JONAS MBONEA.....2nd APPELLANT

versus

THE REPUBLIC ..... RESPONDENT

JUDGMENT

23/05/2022 & 12/7/2022

SIMFUKWE, J.

The appellants Ally Juma @ Omary and Jonas Mbonea were charged before the District Court of Same on four counts:

1st Count: Being in unlawful possession of minerals contrary to **section 18 (1) and (4) (a) of the Mining Act, No. 14 of 2010** read together with **paragraph 27 of the First Schedule of the Economic and Organised Crimes Control Act, Cap 200 R.E 2002** as amended by **section 16 of the Written Laws (Miscellaneous Amendments) Act No. 3 of 2016** and **section 57 (1) of Economic and Organized Crimes Control Act** (supra).

The particulars of the offence were that on 31st day of August, 2017 at Nguruna area in Mkomazi National Park within Same District in Kilimanjaro Region, the appellants were unlawfully found in possession of 7.949 grams of ZIRCON with no commercial value.

2nd Count: Unlawful Mining Minerals in the National Park contrary to **section 6 (1) and (3) of the Mining Act, Act No. 14 of 2010** read together with Paragraph 15 of the 1st Schedule to **section 57 (1)** and **60 (2) of the Economic and Organized Crimes Control Act, Cap 200 R.E 2002.**

It was alleged by the prosecution that on the same date, time and place, the appellants herein were unlawfully found mining 7.949 GRAMS of ZIRCON with no commercial value.

3rd Count: Unlawful construction of pitfalls in the National Park contrary to **section 17 (1) (a) and (2) of the National Parks Act, Cap 282 R.E 2002**

It was alleged by the prosecution that on the same date, time and place, the appellants herein were unlawfully found constructing pitfalls for the purpose of extracting minerals.

4th Count: Unlawful entry in the National Park contrary to **section 21 (1) (a) and (2) of the National Parks Act, Cap 282 R.E 2002.**

It was alleged by the prosecution that on the same date, time and place, the appellants herein were unlawfully found to have entered in Mkomazi National Park for the purpose of commiting an offence therein.

The trial court convicted both accused persons on the 2nd and 4th counts and sentenced them accordingly. Aggrieved by the decision of the trial court, the appellants lodged this appeal against conviction and sentence on the following grounds:

1. *That the prosecution side had failed to prove the area which the appellants was (sic) alleged conducting unlawfully (sic) mining.*
2. *That the learned trial magistrate erred in law and in fact by failing to analyse that there was no independent witness, who was present to witness the search and seizure when the appellants was (sic) arrested.*
3. *That a trial court had erred in law and in fact for admitting exhibit P1 which was the certificate of search and seizure though it did not have appellants' signature.*
4. *That a trial court erred in law and fact for admission of exhibit P10 which was tendered by PW5.*
5. *That a trial court had erred in law and in fact by convicting the appellants based on circumstantial evidence which had no corroboration evidence.*

The appellants prayed that this appeal be allowed by quashing the conviction and set aside the sentence and let them at liberty. They prayed to argue their appeal by way of written submission and their prayer was granted.

In their written submission the appellants submitted that, they urge this Honourable court to consider their written submission because the trial court relied solely upon the evidence of PW1 (Felix Laurent Njowoka) and PW2 (Steven Dominic Saina) to ground conviction against them on the second and fourth counts. They were of the view that evidence of the two noted witnesses falls short of proof.

It was averred that, according to what was testified by the above two prosecution witnesses, it is clear that they failed miserably to prove the area where the appellants were allegedly found doing mining activities.

The appellants elaborated that, they are saying so because though they do not concede to be found in the National Park doing anything, according to the above noted witnesses, if at all the appellants ran away from them, that means they moved and went far from the place allegedly being mined. That, in the whole evidence of the two witnesses, nowhere it was stated that after arresting the appellants they went back to the alleged mined area and inspect the place and determine the activities which were conducted there if the same amounts to what has been stated in the charge sheet particularly on the second count to wit: unlawful mining in the National Park. It was alleged further by the appellants that from what was testified by PW1 and PW2, after chasing and arresting the appellants they took them where they had parked their vehicle and the journey to the Police station started.

It was submitted further that the prosecution side had a duty to prove beyond any doubt the area which was said to be mined by the appellants. During investigation stage, they were supposed to either prepare an inventory evidence or the investigator of the case at hand was supposed to visit the alleged area, draw a sketch map and determine the said activity whether it amounts to unlawful mining. Moreover, during the trial of the case at hand, the prosecution had a chance to pray to the trial court to move to the alleged area and see and determine the area so as to prove that indeed the alleged facts are true and the area real exist. That, failure to do so connotes that the prosecution had failed miserably to prove the allegations on the second count of unlawful mining in the National Park.

Furthermore, that the learned trial magistrate in composing her judgment relied upon the certificate of search and seizure (exhibit P1) to conclude

and believed that the instruments which were listed therein were found with the appellants, despite the same having no signatures of the appellants.

The appellants went on to submit that, prosecution witnesses particularly PW1 and PW2 testified that the 1st accused now the 1st appellant refused to sign exhibit P1 on the reason that he is illiterate and that the 2nd accused who is now the second appellant before this court failed to sign the same as he was in severe pain due to gun shot. The appellants strongly urged this court not to believe and elevate the said arguments from prosecution witnesses as being true and reliable because they are not reasonable and they are wholly unreliable. It was argued that, if the 1st appellant refused to sign exhibit P1 on the ground that he did not know to read and write, the searching and seizing officer who prepared the inventory form was duty bound to read the contents of exhibit P1 to the 1st appellant before requiring him to affix his right hand thumb print. On part of the 2nd appellant, he challenged what was argued by the prosecution concerning his failure to sign exhibit P1 as the prosecution had a duty to prove that indeed and really the 2nd appellant was wounded to the extent that he could not be able to sign exhibit P1. That, the prosecution never summoned the medical doctor who could have had testified on the alleged injuries of the 2nd appellant.

Regarding the said exhibit P1, the appellants submitted further that the learned trial magistrate grossly erred in relying upon exhibit P1 to hold that the items listed therein were positively found with the appellants, but failed to note that the said exhibit P1 was wholly unreliable due to the fact that it contravened the mandatory provisions of the law. That, the prosecution never took the said seized items to the nearest magistrate for

approval soon after the siezure of the alleged items as enshrined under **section 38 (2) of the CPA, Cap 20 R.E 2019**. Further, there was no receipt which was issued after the completion of the said search as mandatorily provided under **section 38 (3) of the CPA** (supra). That, the certificate of seizure which was issued in this case cannot be equated to a receipt mentioned under the above mentioned section.

On the basis of the above noted shortfalls, the appellants opined that the trial court erroneously relied upon such evidence to convict them.

On the fourth count, the appellants contended that the learned trial magistrate grossly erred in convicting them since the cited **section 21 (1) (a) and (2) of the National Parks Act** (supra) does not establish any particular offence and specifically the offence of unlawful entry is not provided or established by the said section. It was elaborated that, the fourth count gives the general punishment when none is specifically provided for in that act. Therefore it was wrong and prejudicial for the trial magistrate to convict the appellants basing on wrong cited provision of the law.

It was concluded by the appellants that they pray this Honourable court to allow this appeal, quash the conviction, set aside the sentence and order that the appellants be set at liberty.

Mr. Rweyemamu, learned State Attorney who appeared for the Republic from the outset he supported the appeal. He submitted that on the second count the appellants were found guilty of unlawfull mining of 7.949 grams of zircon but acquitted of unlawful possession of the said minerals. It was argued that if the appellants did not possess the said minerals automatically they cannot be convicted of mining the same. That, the trial magistrate while discharging them on the count of possession indicated

the discrepancies between the weight which was seized from the appellants and what was tendered in evidence. Mr. Rweyemamu argued further that, if the above noted discrepancy was the basis of discharging the appellants on the count of unlawful possession of minerals, the same should have been done on the count of unlawful mining. He insisted that evidence adduced in this case was contrary to the charge filed in court.

The learned State Attorney raised another weakness of the prosecution case to the effect that on the fourth count which is in respect of unlawful entry into the National Park, the cited sections do not establish an offence that the appellants were charged with. Rather, the provisions simply provide for a general punishment whereby no other punishment is provided for. Thus, the appellants were not properly charged. He prayed the appeal to be allowed.

That marked the end of submissions of both parties.

Despite the fact that the Respondent supports the appeal, the issue is whether evidence adduced by the prosecution before the trial court proves the offences charged beyond reasonable doubts. This being the first appellate court, is obliged to re-evaluate evidence on the record in case the trial court did not evaluate evidence properly to reach at its decision.

The appellants in this case were convicted on the basis of the evidence of PW1 and PW2, the park rangers who arrested them. The said two witnesses testified among other things that they arrested the appellants at Nguruna area within Mkomazi National Park. It was also alleged that the appellants were found mining at the said area, whereas the second appellant was alleged to have been found with eleven pieces of minerals

known as zircon in his pocket. Weapons which were alleged to have been found possessed by the appellants were tendered as exhibits before the trial court (exhibit P1). All documentary evidence in respect of search and seizure of exhibits, handing over and identification of the mineral samples were produced before the trial court to substantiate the charges against the appellants.

In their defences before the trial court both appellants simply denied to have committed all the offences charged. In their grounds of appeal, they contested the certificate of search and seizure and the inventory form alleging that the said documents lacked their signatures. The appellants also opposed their conviction in respect of the two offences which they were convicted with on the reasons that their acquital on the first count made the offence charged on the second count to have no legs to stand. That, the provision cited in respect of the fourth count does not establish the offence of unlawful entry into the National Park.

The learned State Attorney supported the arguments advanced by the appellants.

Having considered the raised weaknesses of the prosecution case, I took my time to examine evidence on the trial court's record as well as the applicable laws.

Starting with the offence charged on the fourth count, thus unlawful entry into the National Park, it may be noted that offences charged on the second and third count are based on the offence charged on the fourth count. Both the appellants and the learned State Attorney pointed out that **section 21 (1) (a) of the National Parks Act** does not establish the offence charged. Indeed, the section provides general penalties for the prescribed offences including the offence of unlawful entry. Recently, the

Court of Appeal of Tanzania faced a scenario similar to the scenario of this case in the case of **Dogo Marwa @ Sigana and Another v. The Republic, Criminal Appeal No. 512 of 2019**, CAT at Musoma. At page 13-14 of the judgment the Court held that:

> *"It is now apparent that the amendment brought under Act No. 11 of 2003* ***deleted the actus reus (illegal entry or illegal remaining in a national park)*** *and got confusion in section 21 (1) of the NPA. As far as we are concerned,* ***the appellants were charged, tried, convicted and sentenced for a non-existent offence of unlawful entry into Serengeti National Park."***
> Emphasis added

The same applies to the instant matter, there is no doubt, as far as the fourth count is concerned, the appellants were charged, tried, convicted and sentenced for a non-existent offence. As I have already noted, the offence charged on the fourth count affects the offences charged on the second and third count as one cannot unlawfully conduct mining activities in the National park without first unlawfully entering into the National Park. Also, you cannot dig or construct a pitfall in the National Park without unlawfully entering into the National Park. I wish to point out that the deleting which was done in **section 21** (supra) seems to be accidental which if not rectified, many offences prescribed to be committed within National Parks are expected to crumble. Apart from that, the prescribed fees for entering into Tanzanian National Parks under **The National Parks (Amendment) Regulations, 2018. GN No. 666 of 02/11/2018** will be useless and unenforceable, if the offence of unlawful entry does not exist. Hopefully, the responsible authorities will do the needful to rescue the situation.

Otherwise, in the circumstances of this case the conviction and sentence against the appellants cannot stand. In the event, I hereby allow the appeal by quashing the conviction entered on the two counts and set aside sentences against the appellants. Appellants should be released from custody immediately unless held for other lawful reasons.

It is so ordered.

Dated at Moshi this 12th day of July 2022.

S.H. SIMFUKWE

JUDGE

12/7/2022