**IN THE COURT OF APPEAL OF TANZANIA**
**AT DODOMA**

**(CORAM: MUGASHA, J.A., NDIKA, J.A. And LEVIRA, J.A.)**

**CRIMINAL APPEAL NO. 356 OF 2018**

**DIRECTOR OF PUBLIC PROSECUTIONS ..... APPELLANT**

**VERSUS**

**1. LEE LENINA**
**2. BARAKA LENINA } ..... RESPONDENTS**

**(Appeal from the Judgment of the High Court of Tanzania at Dodoma)**

**(Kalombola, J.)**

**Dated 3rd day of October, 2018**

**in**

**DC. Criminal Appeal No. 30 of 2018**

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## JUDGMENT OF THE COURT

1st & 12th June, 2020

**LEVIRA, J.A.:**

The Director of Public Prosecutions (DPP) was aggrieved by the decision of the High Court (Kalombola, J.) in DC Criminal Appeal No. 38 of 2018 dated 3rd of October, 2018. In the said appeal, the appellant had challenged the decision of the trial District Court of Kondoa District at Kondoa in Criminal case No. 85 of 2018 where the respondents herein were charged with three counts, to wit, first count, unlawful entering in a game reserve contrary to section 15(1) and (2) of the Wildlife Conservation

Act, No. 5 of 2009 (the WCA); second count, unlawful grazing livestock in a game reserve contrary to section 18(2) and (4) read together with section 111(1) (a) of the WCA; and third count, unlawful destruction of vegetation in a game reserve contrary to section 18(1) and (3) of the WCA.

It is noteworthy that the trial magistrate observed in his judgment that the respondents were wrongly charged with those three counts. According to him, the offences were supposed to be charged in the alternative. As a result, he held that the first and third counts are null and thus, he determined only the second count. Having been satisfied that the prosecution failed to prove the second count beyond reasonable doubt, the trial magistrate proceeded to acquit the respondents. The decision of the trial court was upheld by the High Court in DC Criminal Appeal No. 30 of 2018 and hence the current appeal.

A brief background of this case can be traced to the 5th day of March, 2018 at 15:00 hours, a date which the prosecution had alleged that the respondents were found in Mkungunero Game Reserve within Kondoa District in Dodoma Region by Thomas Mwatwinza committing the above charged offences without a written permit from the Director of Wildlife. To prove the charge against the respondents, the prosecution called three

witnesses, namely Wanles Thobias (PW1), Julius Mbiaji (PW2) and Thomas Mwatwinza (PW3). In essence, all the three witnesses are game officers whose evidence was to the effect that, on the material day they were together conducting patrol in Mkungunero Game Reserve. In the course of patrolling, they said, they saw a herd of cattle and having come closer to the cattle, they also saw two Masai youths. They tried to arrest them but the youths ran away. Therefore, they seized that herd of cattle and moved it to a temporary corral found in the game reserve. At page 12 of the record of appeal, PW2 testified that, having seized the said cattle, they reported the incident to their office situated at Kondoa and were instructed to continue holding those cattle.

According to PW1, on the following day the two Masai youths went to the said game reserve and claimed that their cattle were lost. He added that, upon being interrogated, the game officers realised that those Masai youths were the ones whom they saw on the previous day in the game reserve committing the alleged offences. On his part, PW3 testified in regard to the recognition of the respondents to the effect that, when the said Masai went to search for the cattle, the game officers looked at them and noticed that they were the ones who ran away from the game reserve

the other day. The respondents were arrested and taken to Kondoa Police Station and later charged, prosecuted and acquitted as introduced above.

Before us the appellant has presented three grounds appearing in the memorandum of appeal as follows:-

1. That, the trial Court erred in law and fact by holding that the respondents were wrongly charged with the first and third count.

2. That, the trial court erred in law and fact by holding that the respondents managed to create doubt in their favour; to mean the appellant failed to prove the case beyond reasonable doubts.

3. That the trial court erred in law and in fact by entering a drawn order in a Criminal case.

At the hearing of this appeal, the appellant was represented by Mr. Tumaini Kweka, learned Principal State Attorney assisted by Mr. Pius Hilla and Ms. Lina Magoma, both learned Senior State Attorneys. The respondents had the services of Mr. Deus Nyabiri, learned advocate assisted by Ms. Sophia George also learned advocate.

In the course of hearing Mr. Kweka dropped the third ground of appeal and therefore, only the first and second grounds of appeal were argued.

Submitting on the second ground of appeal, Ms. Magoma stated that the trial court misdirected itself in law and fact when it stated that the respondents adduced relevant evidence which created doubt on the prosecution case. According to her, PW1, PW2 and PW3 saw the respondents in Mkungunero Game Reserve while committing the alleged offences but they did not arrest them because the respondents ran away. However, it was her further submission that, the said prosecution witnesses managed to identify the respondents on the next day after the event, that is, on 6/3/2018 when the respondents went to claim for cattle which were seized in the said game reserve.

Ms. Magoma submitted that PW1, PW2 and PW3 identified the respondents, but they did not give a clear description of the Masai whom they saw in the Game Reserve. She argued that the respondents were arrested because they are Masai and went to claim for the seized cattle, which she said, belonged to the respondents. As for her, this is a reason as to why the game officers identified the respondents. It was her further argument that the respondents grazed in a game reserve in terms of section 18(2) of the WCA even in their absence in the game reserve as they claimed because they were the owners of those cattle. To support her

arguments, she cited to us the High Court decision in **Enos Joseph @ Edward and Another v. Republic**, Criminal Appeal No. 30/2017 and **The Director of Public Prosecutions v. Boniphace Thomas and Another**, Criminal Appeal No. 31 of 2019 (both unreported).

Mr. Kweka supported Ms. Magoma's submission regarding the identification of the respondents. Both learned counsel argued that, the identification circumstances of the case at hand are distinguishable from those in the case of **Waziri Amani v. Republic** [1980] TLR 250. Therefore, Mr. Kweka urged the Court to consider that prosecution witnesses were credible and must be believed their testimony need to be accepted as it was stated in the case of **Goodluck Kyando v. Republic** [2006] TLR. 363.

In addition Mr. Kweka submitted that, at page 13 of the Record of Appeal PW2 stated that Game Officer came closer to the respondents but they ran away; PW3 stated that they saw Masai youths; at page 17 of the record of appeal, Meloloshi Legisa (DW3) and God Endavanda (DW4) at page 18 stated that the cattle belong to the respondents. According to him, inference can be drawn from this evidence that the respondents were identified by the prosecution witnesses.

Regarding the first ground of appeal, Mr. Hilla submitted that the trial magistrate erred when he decided that it was wrong to charge the respondents with the offence of unlawful entering and unlawful destruction of vegetation in the game reserve. He argued that those are two distinct offences although they fall under the same statute, that is, the WCA. However, he said, they serve different purposes as the offence of entering targets any person who enters a game reserve unlawfully regardless of whether he has cattle or not; while, the offence of unlawful destruction of vegetation is aimed at preserving vegetation in the game reserve. Thus, he contended that the first count was preferred because the respondents entered 7 kms inside the game reserve and the third count was preferred because when the cattle entered in the said game reserve, they destroyed vegetation. He cited the case of **Director of Public Prosecutions v. Morgan Maliki and Another**, Criminal Appeal No. 133 of 2013 (unreported).

Mr. Hilla submitted further that, section 18 (1) of the WCA does not state about destruction of vegetation but he said, since 265 cattle entered the game reserve they caused destruction of vegetation. Therefore, the respondents were properly charged under that provision. He urged us to

consider his submission, reverse the decisions of the lower courts, decide on those two counts and if the respondents will be found guilty, be convicted accordingly.

Finally, he submitted that the prosecution proved its case beyond reasonable doubt and urged us to allow this appeal. In addition, he prayed for the Court to order the Manager of Mkungunero Game Reserve to forfeit the seized 265 herd of cattle to the Government.

In reply, Mr. Nyabiri submitted that there is a doubt as to whether or not the cattle were found in the game reserve. According to him, there is contradictory evidence regarding where the cattle were found. He said, at page 14 of the record of appeal, while PW3 stated that the cattle were kept 7 kms after being seized at page 16B of the record it was stated that the said cattle were found 3kms outside the game reserve. This means, he said, there is no evidence that the cattle were found in the game reserve and he thus urged us to find so.

Regarding identification of the respondents, Mr. Nyabiri submitted that the people who were seen in the game reserve by the prosecution witnesses were not identified. He argued that, it is not proper to say that the two Masai youths who were seen in the game reserve are the

respondents. He insisted that visual identification evidence must be watertight as it was decided in **Idd Ismail v. Republic**, Criminal Appeal No. 69 of 2014 (unreported).

In addition, Mr. Nyabiri faulted the prosecution identification evidence stating that, the distance between prosecution witnesses (PW1, PW2 and PW3) and the said Masai youths was not stated. The only thing stated by those witnesses is that they saw two Masai youths. He argued that, had it been that the respondents were not sent by their father to the game reserve to search for the cattle, they could not have been arrested. He strongly submitted that, the respondents went to the game reserve on 6th March, 2018 because they were asked by their father who is the owner of the seized cattle to search for them. He also argued that initially, the respondents had no idea on whereabouts of the said cattle and to prove this, he said, at page 17 of the record when the first respondent (DW1) was cross-examined, he stated that the cattle were grazed by kids; at page 18 God Endavanda (DW4) said, when they (DW3 and DW4) arrived at the game reserve to search for those cattle, they were told by the game officers to go back home and leave the respondents with those game officers without being informed that the respondents were seen committing

offences in the game reserve on the previous day. Therefore, he said, the inference which the Court was asked to draw by the appellant's counsel on the respondents, that they were identified by the prosecution witness cannot be drawn under the circumstances. He added that, the cases cited by the appellant's counsel are distinguishable because in the case at hand the owner of the cattle is not a party to this case and the respondents are not the owners.

Submitting on the first ground of appeal, Mr. Nyabiri stated that the decision of the trial court regarding those two counts based on the decision of the High Court in **Director of Public Prosecutions v. Athumani Tangawizi,** Criminal Appeal No. 250 of 2017 (unreported) where the High Court opined that the accused's act of entering Selous Game Reserve and grazing herd of cattle therein had constituted a crucial element in two different offences which cannot be charged independently, they ought to have been charged in the alternative.

The learned counsel submitted further that the District Court (trial Court) is bound by the decision of the High Court. Therefore, if that decision is not overruled, then the trial magistrate was right to use it and arrive to the decision it made. He thus argued that, offences under section

18 (1) and (2) of the WCA were not supposed to be charged differently. As such, he said, the first and third counts were supposed to be charged in alternative.

In conclusion, he urged us to dismiss this appeal and order the restoration of the seized cattle to the owner.

Mr. Kweka submitted in his brief rejoinder that the appellant is appealing against the decision of the High Court which upheld trial court's decision. He insisted that the respondents were found and identified by the prosecution witnesses while grazing cattle in the game reserve. Therefore, they were properly charged under the provisions of the law indicated above. According to him, the prosecution proved the case against the respondents beyond reasonable doubt. Therefore, he prayed for the appeal to be allowed.

We have dispassionately considered the competing submissions of the learned counsel for the parties, the record of appeal and grounds of appeal. The main issues calling for our determination are three, to wit, whether it was right for the trial magistrate to hold that the respondents were wrongly charged with the first and third counts; whether the

respondents were properly identified at the scene of crime and whether the charge against the respondents was proved beyond reasonable doubt.

Submitting on the first issue, appellant's counsel argued that it was wrong for the trial magistrate to decide that the respondents were wrongly charged with the first and third counts as they were supposed to be charged in alternative. According to the appellant's counsel, those counts create distinct offences. On the other hand, the counsel for the respondents was in favour of the decision of the trial court as he said, the trial court was guided and bound by the decision of the High Court as indicated above and as such the respondents were wrongly charged with the first and third counts.

At page 37 of the record of appeal, immediately after quoting the decision of the High Court in the case of **Director of Public Prosecutions v. Athumani Tangawizi** (Supra) the trial magistrate stated as follows:-

> *"So due to that decision I observe the same that the two accused persons were wrongly charged with three counts independently but were required to be charged in alternative. And I therefore hold that the first and third count is null (sic) and hereby nullified and remaining with the second count."*

It is observed that, the trial magistrate did not bother to test the adduced evidence on those counts; instead, he straight away nullified them. Now whether he was right or wrong, we agree with the appellant's counsel that although the charged offences are created under the same statute, they serve different purposes. For more clarity, the said provisions of the WCA provides as follows:-

> Section 18(1) "Any person shall not wilfully or *negligently cause and bush or grass fire, or fell, cut, burn injure or remove any standing tree, shrub, bush, grass, sapling, seedling or any part thereof in a game reserve except in accordance with the written permission of the Director previously sought and obtained."*
>
> 18(2) *"Any person shall not graze any livestock in a game reserve or wetlands reserve."*

It can further be observed that, the above two offences attract different punishments. Contravention of section 18(1) of the WCA attracts a fine between two and five hundred thousand shillings or imprisonment of a term of three to five years or both, while the offence under section 18(2) attracts a fine between three hundred thousand to five million or

imprisonment term of not less than two years but not exceeding five years or both.

It is quite clear that, the above quoted provisions create distinct offences. The commission of those offences is done directly by a person's act and through an agent (livestock) respectively.

Apart from those two offences the first count was preferred under section 15(1) and (2) of the WCA which provides that:-

> *"Any person other than the person travelling through the reserve along a highway or designated waterway shall not enter a game reserve except by and in accordance with the written authority of the Director previously sought and obtained."*

Subsection (2) provides for a punishment for contravention of subsection (1) of section 15.

The quoted provision above speak for itself that even entering in a game reserve without permit is an offence. We entertain no doubt that this provision was enacted to cater for anyone who enters game reserve without permit, whether he is or is not a livestock keeper for no or other purposes.

Therefore, we are settled that, the three counts preferred against the respondents were distinct and it was right for them to be charged separately. With respect, we do not agree with the counsel for the respondents that the trial magistrate was right to nullify them at judgment writing stage. The trial magistrate ought to have determined the guilt or otherwise of the respondents on those counts in accordance with the adduced evidence. The two nullified counts were not cognate offences to the second count and thus, the decision of the trial magistrate was wrong. Similarly the decision of the first appellate court which upheld the trial court's decision was wrong in that respect. In that regard, we hold that the first ground of appeal is merited.

Now whether there is enough evidence on record to warrant conviction of the respondents on those two counts, we shall deal with this issue as we address the second issue, whether or not the respondents were properly identified at the scene of crime.

It is trite that the evidence on visual identification must be watertight. This means that all possibilities of mistaken identity must be eliminated before relying on such evidence. Our jurisprudence is rich in that area and we have a number of decisions including the case of **Waziri**

**Amani v. Republic** [1980] TLR 250 referred by the counsel for the respondents.

In the case at hand, the appellant's counsel claimed that PW1, PW2 and PW3 proved that they saw the respondents in the Game Reserve while grazing cattle therein. As intimated earlier on, in his evidence PW1 stated at page 10 of the record as follows:-

> *"I was in Mkungunero game reserve continuing with patrol we managed to see a herd of cattle in that game reserve. After came closer with that herd of cattle we also saw people grazing that cow (sic) and they run away."*

At page 12 PW2 stated that:-

> *"While continuing with patrol in that game reserve we managed to saw (sic) herd of cattle grazing in that game reserve. We decided to come closer to that herd in order to be sure who are that (sic) people grazing in that game reserve. Hence we saw two Masai youths. While we tried to arrest them, they run away."*

At page 13 of the record PW3 stated as follows:-

> *"While we were on patrol in that game reserve at about 03:00hrs we found herd of cattle having*

*grazing by two youths. While we came closer to that herd of cattle that two youths run away to the bush. We tried to arrest them but we didn't got (sic) them."*

The above piece of evidence does not indicate how those prosecution witnesses identified the respondents. They only ended saying that they came closer to the two Masai youths, but the proximity is not disclosed. Apart from that, the identifying witnesses failed to describe the said Masai youths and state what made them to believe that they were Masai youths. Even the terms of description of the respondents such as attire and physique is lacking. We do not agree with the line of argument taken by the counsel for the appellant that the two Masai youths who were seen by the prosecution witnesses on the material date were the respondents simply because the respondents went to search for cattle on the following day in the said game reserve and they are of Masai origin. In our considered view, a proper identification was supposed to be done at the scene of crime and probably, the identifying witnesses were only required to recognise the culprits whom they saw the previous day.

We appreciate the position of law stated by Mr. Kweka while referring the case of **Goodluck Kyando v. Republic** (supra) 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. However, with respect, we are of the view that the credibility of prosecution witnesses in regard to who were seen in Mkungunero Game Reserve on the material date is doubtful. It is not in dispute that PW1, PW2 and PW3 saw people in the said game reserve grazing cattle, but they failed to establish who those people were. A mere fact that the respondents went to recover cattle which they said belonged to their father, is not sufficient evidence to justify that they were the ones who were seen by the prosecution witnesses grazing cattle on the material day. Therefore, we agree with Mr. Nyabiri that the respondents were not properly identified by the prosecution witnesses.

It follows therefore that, since the respondents were not identified at the scene of crime, all the three counts were not proved beyond reasonable doubt. Consequently, the second and third grounds of appeal are answered in negative; and the decision of the lower courts in respect of the second count is hereby upheld.

We decline the invitation of ordering forfeiture of the seized cows extended to us by the counsel for the appellant. We partly allow this

appeal to the extent expressed above and maintain the order of the trial court regarding the seized cattle to be returned to the owner.

Order accordingly.

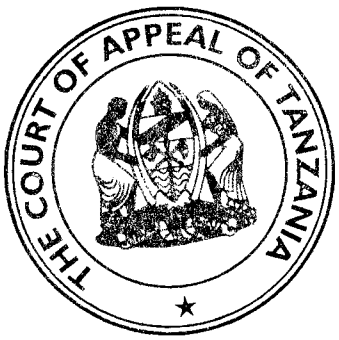
**DATED** at **DODOMA** this 9th day of June, 2020.

S. E. A. MUGASHA
**JUSTICE OF APPEAL**

G. A. M. NDIKA
**JUSTICE OF APPEAL**

M. C. LEVIRA
**JUSTICE OF APPEAL**

This Judgment delivered on 12th day of June, 2020 in the presence of Ms. Salome Magesa, learned Senior State Attorney and Mr. Salimu Msemo, learned State Attorney for the Appellant and Mr. Deus Nyabiri, learned counsel for the Respondents, is hereby certified as a true copy of the original.




G. H. HERBERT
**DEPUTY REGISTRAR**
**COURT OF APPEAL**