IN THE COURT OF APPEAL OF TANZANIA

AT MUSOMA

(CORAM: JUMA, C.J., KITUSI, J.A. And MASHAKA, J.A.)

CRIMINAL APPEAL NO. 511 OF 2019

WILLY KITINYI @ MARWA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the judgment of the Court of Resident Magistrate of Musoma with Extended Jurisdiction at Musoma)

(Ng'umbu, RM EXT.JUR)

Dated the 18th day of October, 2019
in
Criminal Appeal No. 20 of 2019

JUDGMENT OF THE COURT

22nd & 25th October, 2021

KITUSI, J.A.:

In the District Court of Serengeti at Mugumu, the appellant Willy Kitinyi @ Marwa was tried for charges preferred under three counts, and he was convicted with all.

The first count was under section 21(1) (a), (2) and 29(1) of the National Parks Act [Cap 282 R.E 2002] (the NPA) as amended by the Written Laws (Miscellaneous Amendments) Act No. 11 of 2003. This was in relation to unlawful entry into the National Park, it being alleged that on 31st day of July, 2018 at Korongo la Hingira area within Serengeti National

Park, the appellant was found within that National Park without permission of the Director.

The second count under section 24(1) (b) and (2) of the NPA was for unlawful possession of weapons in the National Park, alleging that on the same date, at the same time and place, the appellant was found in possession of a knife, and two trapping wires which are weapons, and that he had no permit or proof to satisfy an authorized officer that the said weapons were not intended to be used for purposes other than hunting, killing, wounding or capturing animals.

The third and last count was an economic offence preferred under section 86(1) and (2) (c) (iii) of the Wildlife Conservation Act No. 5 of 2009 (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 Economic and Organized Crime Control Act [Cap 200 R.E 2002] (the EOCCA) as amended by the Written Laws (Miscellaneous Amendments) Act No. 3 of 2016. In relation to this count, it was alleged that on the same date, at the same time and place as indicated in the preceding counts, the appellant was found in unlawful possession of seventy pieces of dried meat of wildebeest, valued at Tshs.14,430,000/= the property of the United Republic of Tanzania.

The prosecution's version of the matter was that on 31st July, 2018 at about 13:00 hours game scouts Jesca James Mwachae (PW1) and Nikas Liberat (PW2) while on routine patrol at Hingiri area within Serengeti National Park, they spotted a man in the bush. After surrounding and apprehending the man they found him to be in possession of a knife, two trapping wires and 70 pieces of dried wildebeest meat. The man turned out to be the present appellant, and when it was found that he had no permit to enter and possess those items, he was arrested and taken to Mugumu Police Station. On the day following the arrest of the appellant, Wilbroad Vicent (PW3) a Wildlife Warden, identified the meat and confirmed it to be of Wildebeest, valued at USD 650 X 10 (wildebeests) equivalent to Tshs. 14,430,000/=. He prepared a valuation certificate which was tendered in court as exhibit P.E 2.

The trial court rejected the defence case in which the appellant had denied being found in possession of any government trophies. He stated that if the police had found him in possession of the meat as alleged, why was he not involved when PW3 examined and valued the said pieces of meat.

Finally, the trial court concluded that on the evidence of PW1, PW2 and PW3, the charge against the appellant had been proved in respect of

all three counts and that what the appellant said in defence, did not cast any reasonable doubt. The trial court imposed custodial sentences to the appellant in all three counts, that is one year, two years and twenty years for the first, second and third counts respectively, with an order for them to run concurrently. He appealed against the convictions and sentences, but Hon. W. S. Ng'umbu, learned Resident Magistrate, exercising Extended Jurisdiction under section 45(2) of the Magistrates Courts Act, dismissed the appeal, taking a rather generalized view that the case against him had been proved beyond reasonable doubt.

This is a second appeal predicated on four grounds which raise the following issues of complaint: -

1. *Both the trial court and the first appellate court did not consider the defence.*
2. *The prosecution's failure to call an independent witness affects the credibility of the evidence of game scouts and park rangers.*
3. *The two courts below erred in acting on exhibits that were wrongly prepared by park rangers.*
4. *There was no proof that the appellant was arrested within the National Park.*

At the hearing of the appeal, however, these grounds did not form the subject of discussion although the appellant, who entered appearance

by being connected electronically from Musoma Prison, adopted them and opted for the respondent's attorney to address us first. On the other hand, the respondent was represented by Messrs. Valence Mayenga Senior State Attorney, Yese Temba, and Roosebert Nimrod Byamungu, learned State Attorneys. Mr. Temba who argued the appeal, sought to support it although on a ground other than those of the appellant.

Mr. Temba argued that the main reason for the respondent to support the appeal is the invalidity of the judgment of the first appellate court. The learned State Attorney submitted that in its judgment, the first appellate court did not consider the grounds of appeal at all but determined the appeal on the basis of other issues raised by it. Mr. Temba further argued that such approach was inconsistent with the requirement of the law, citing the case of **Simon Edson @ Makundi vs. Republic,** Criminal Appeal No. 5 of 2017 (unreported). The learned State Attorney went on to submit that if we go along with his argument on the invalidity of the judgment of the first appellate court, we should invoke our powers of revision under section 4(2) of the Appellate Jurisdiction Act [Cap. 141 R.E 2002] (the AJA) to nullify the judgment of that court.

The appellant being an unrepresented lay person had nothing to say on this technical issue.

We are going to deal with the alleged invalidity of the judgment of the first appellate court right away. We begin by endorsing as correct, Mr. Temba's argument that the duty of an appellate court such as the High Court or a Court of Resident Magistrate with extended Jurisdiction as was in this case, is to resolve issues raised in the grounds of appeal. In this case there were four grounds of appeal as appearing at page 52 of the record of appeal and we think the proceedings before Hon. W. S. Ng'umbu, Resident Magistrate with extended jurisdiction, would not be an appeal if those grounds were totally ignored.

In the case of **Simon Edson @ Makundi** (supra), cited by the learned State Attorney, we said the following in respect of a similar anomaly: -

> *"Reading from the extract above, it is clear that the first appellate judge neither considered the grounds of appeal presented before that court, nor did she re-evaluate the evidence on record to analyze whether the trial Court was correct in its findings. There is therefore no gainsaying that the High Court judgment is not a judgment which the law envisages."*

Back to our case, while the petition of appeal at page 52 had raised issues such as failure to consider defence, omission to call independent

witnesses, improper tendering of exhibits and wrongly relying on hearsay evidence, the learned Resident Magistrate with extended jurisdiction discussed none of those. Instead he took the view that: -

"The issues for determination of this appeal are:

1. *Whether the prosecution proved the case to warrant the conviction of the appellant of the offences.*
2. *Whether the sentences imposed on the appellant for the offences were legal and their extent were justified."*

We wish to state that the powers of an appellate court must always be exercised within the law conferring such powers. While in dealing with criminal appeals, this Court is guided by S.6 of the AJA and rules 72 and 81 of the Tanzania Court of Appeal Rules, 2019 (the Rules), the High Court, or for that matter, a Resident Magistrate with extended jurisdiction, must observe, among other provisions, the dictates of section 366 of the Criminal Procedure Act [Cap 20 R.E 2002] (CPA), which provides:-

> *"At the hearing of the appeal, the appellant or his advocate may address the court in support of the particulars set out in the petition of appeal and the Public Prosecutor, it he appears, may then address the court and thereafter the court may invite the appellant or his advocate to reply upon any matters of law or of*

fact raised by the Public Prosecutor in his address and the court may then if it considers there is no sufficient ground for interfering, dismiss the appeal or may..."

Obviously, the above provision contemplates a decision of the High Court or of a Resident Magistrate with extended jurisdiction, proceeding from arguments made by the parties in relation to the particulars set out in the petition of appeal. In our view, deviation from that legal requirement, as rightly argued by Mr. Temba, vitiates the judgment.

Very recently while dealing with a similar scenario in **Nyakwama Ondare @ Okware vs Republic,** Criminal Appeal No. 507 of 2019 (unreported) we said and we reiterate that: -

"In the instant appeal, we unreservedly note that the first appellate court did not address and determine the grounds of appeal separately or generally. On the contrary, as intimated above, it simply framed its own points for the determination of the appeal which did not relate to the appellant's complaints in the six grounds of appeal in the petition of appeal.

In the event, we invoke the provisions of section 4(2) of the AJA to revise and nullify the judgment of the first appellate court for being a nullity."

Likewise, in this case, we accept Mr. Temba's invitation to invoke our revisional powers under section 4(2) of the AJA. We revise and nullify the judgment of the first appellate court, it being based on points quite unrelated to the substance of the complaints raised in the petition of appeal.

Mr. Temba addressed us on the way forward pointing out that there are two options, that is, to remit the record to the first appellate court for it to compose judgment in compliance with the law or step into the shoes of that court to consider the substance of the appeal. The learned State Attorney urged us to take the latter option because, he said, there are apparent defects which would render remission of the record a futile exercise and not in the interest of justice. The learned State Attorney mentioned the defects and submitted on them.

The first defect, he submitted, was that in the first count, the appellant was charged with and convicted on a non-existent offence. Mr. Temba submitted that section 21(1)(a) of the NPA does not create the offence of unlawful entry into the National Park as cited. In relation to the second count, Mr. Temba submitted that it was not proved because the weapons the subject of the charge were tendered by a Public Prosecutor. As for the third count, Mr. Temba submitted that the pieces of meat the

subject of the charge under that count were not tendered as an exhibit. That is because, he submitted, the form of inventory that purported to represent those pieces of meat, was prepared in violation of the procedure. One, the appellant did not take part in that process therefore denied a hearing. Two, he did not sign that document. The case of **Mohamed Juma @ Mpakama vs. Republic,** Criminal Appeal No. 385 of 2017 (unreported) was cited by the learned State Attorney to support his arguments.

Mr. Temba prayed that having nullified the judgment, we should proceed to set the appellant free because in view of the ailments pointed out above, that is the only way forward.

The appellant did not have anything to say again, but this time he supported the learned State Attorney's prayer for his release.

We shall follow suit and step into the shoes of the first appellate court to determine the appeal against the convictions and sentences. We instantly agree with Mr. Temba that in relation to the first count, the appellant was charged with and convicted on a non-existent offence, because section 21(1) (a) (2) of the NPA does not create the offence of unlawful entry into a game reserve. We need not mince words, in our view, because this is not one of those defects that can be cured by section

388 of the CPA. Very recently in **Dogo Marwa @ Sigana vs Republic,** Criminal Appeal No. 512 of 2019 (unreported) we faced a similar situation and held: -

> *"Ironically, before the amendment of the NPA by Act No 11 of 2003, section 21 clearly disclosed an offence of unlawful entry into national parks:"*

Having reproduced the old provisions of section 21(1) of the NPA, we went on to state: -

> *"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".*

We hold that the defect denied the appellant a fair hearing because he could not prepare an informed defence against a non-existent offence. This discussion is sufficient to dispose of the first count.

On the second count which alleged that the appellant was found in possession of weapons within the national park, we agree with Mr. Temba's argument again. However, before discussing the argument advanced by Mr. Temba on this point, we are of the view that to succeed in this count, the prosecution must first establish that the appellant was found in the game reserve. Now, as the first count which had attempted

to charge the appellant with unlawful entry into a game reserve has collapsed, the second count remains with no legs on which to stand. Alternatively, and here comes Mr. Temba's argument, proof of the second count was dependent on production of the weapons as evidence. It has been submitted that the knife and trapping wires were wrongly tendered in court by the Public Prosecutor. Indeed, the record of appeal shows, at page 23, that it is the Public Prosecutor who sought to introduce the two weapons into evidence and the trial court admitted them collectively as exhibit P.E .1.

In many of the Court's previous decisions, it has held production of exhibits by Public Prosecutors to be incompetent because they cannot perform duties of witnesses while at the same time prosecuting a case. An example of such decisions is the case of **DPP vs Festo Emmanuel Msongeleli & Another,** Criminal Appeal No. 62 of 2017 (unreported). In **Nyakwama Ondare @ Okware** (supra) while discussing a similar point, we reproduced the following passage from our earlier decision in **Thomas Ernest Msungu @ Nyoka Mkenya vs Republic,** Criminal Appeal No. 78 of 2012 (unreported): -

> *"Under the general scheme of the Criminal Procedure Act .... Particularly sections 95, 96, 97, 98 and 99*

thereof, it is evident that the key duty of a prosecutor is to prosecute. A prosecutor cannot assume the role of a prosecutor and witness at the same time. In tendering the report, the prosecutor was actually assuming the role of a witness. With respect that was wrong because in the process the prosecutor was not the sort of 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 or cross- examined on the report."

We take a similar position and expunge exhibit P.E1 from the record because it was wrongly tendered by a public prosecutor instead of a witness. This leaves the second count hollow and incapable of being proved.

A similar bad omen haunts the third count. In respect to this count, unless the prosecution produced in court the pieces of meat alleged to have been of wildebeest, they could not prove the offence under that count. Now we are told, and it happens quite often, that to avoid the meat decaying, an order was made by a Magistrate to destroy it and an Inventory Form was signed. It is the preparation of the inventory that is under attack. Mr. Temba has submitted that the appellant did not participate in the process of ordering destruction of the meat so he was

denied a hearing. To add to that, the appellant did not sign that inventory. Mr. Temba cited the case of **Mohamed Juma @ Mpakama vs Republic,** Criminal Appeal No. 385 of 2017 (unreported) to support his position that the procedure was violated. With respect, we agree with the learned State Attorney.

In the case cited above by the learned State Attorney, after referring to the powers of the police under paragraph 25 of the PGO to obtain a disposal order before trial, the Court held: -

> *"While the police investigator ...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." (emphasis added)*

The same fate befalls the present case in that the inventory form (exhibit P.E.3) could not be proved against the appellant who did not take part in the process of its preparation. As such the very basis of the third count collapses, and so does the charge.

In fine and for all those reasons, and having nullified the judgment and quashed the convictions, we set aside the sentence, with an order that the appellant be set free unless held for some other lawful cause.

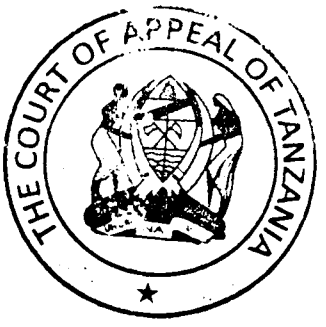
DATED at **MUSOMA** this 25th day of October, 2021

I. H. JUMA
CHIEF JUSTICE

I. P. KITUSI
JUSTICE OF APPEAL

L. L. MASHAKA
JUSTICE OF APPEAL

The Judgment delivered this 25th day of October, 2021 in the Presence of Mr. Kainunura Anesius, learned Senior State Attorney and Mr. Moses Mafuru, learned State Attorney for the Respondent/Republic and the Appellant appeared remotely via Video link from Musoma Prison is hereby certified as a true copy of the original.



K. D. MHINA
REGISTRAR
COURT OF APPEAL