IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF MUSOMA

AT MUSOMA

CRIMINAL APPEAL CASE No. 32 OF 2022

(*Arising from the District Court of Tarime at Tarime in Economic Case No. 57 of 2020)*

MWERA NYAKENGWENA @ MWITA .... **APPELLANT**

Versus

REPUBLIC .... **RESPONDENT**

JUDGMENT

15.09.2022 & 21.09.2022
Mtulya, J.:

The present appeal was lodged in this court to dispute the judgment of the **District Court of Tarime at Tarime** (the district court) in **Economic Case No. 57 of 2020** (the case). **Mr. Mwera Nyakengwena @ Mwita** (the appellant) was aggrieved by the decision of the district court in the case which found him guilty of three (3) offences, *viz*: First, unlawfully entry into the national park contrary to section 21 (1) (a) & 29 (1) of the **National Parks Act** [Cap. 282 R.E. 2002], as amended by Written Laws (Miscellaneous Amendment) Act, No. 11 of 2003 (the National Parks Act); second, unlawful possession of weapons in the national park against section 24 (1) (b) & (2) of the National Parks Act; and third, unlawful possession of government trophies

against section 86 (1) & 2 (c) (iii) of the **Wildlife Conservation Act** [Cap. 283 R.E. 2002] as amended by the Written Laws (Miscellaneous Amendment) Act No. 2 of 2016 (the Wildlife Act) read together with section 57 (1) & 60 (2) and paragraph 14 of the First Schedule to the **Economic and Organized Crimes Control Act** [Cap. 200 R.E. 2019] (the Economic Crimes Act).

Following the pronouncement of the conviction and sentence on 11th January 2022 by the district court in the case, the appellant approached this court and filed a total of six (6) protests, in brief: first, the charge originated from land dispute; second, failure to consider defence evidence; third, failure to analyze exhibit PE.3; fourth, hearsay evidence of PW1, PW2, PW3, and PW4; fifth, fault in procedure in admitting exhibit PE1; and finally the case was not proved beyond reasonable doubt.

When the parties were summoned on 15th September 2022 to register relevant materials for and against the appeal, the parties invited learned minds in Ms. Naomi Paul, learned counsel to appear and argue for the appellants whereas the respondent called Mr. Isihaka Ibrahim, learned State Attorney. Ms. Paul was the first to conquer the floor of this court contending that the case in the district court was not proved beyond doubt as per requirement of the law. Subsequent to the complaint, Ms. Paul

decided to consolidate all grounds of appeal into one ground of appeal to reflect the cited complaint. In her opinion, all grounds of appeal are based on one complaint and is reflected at the final ground of appeal in the petition of appeal.

In order to bolster her submission, Ms. Paul had registered in this court three (3) reasons in support of the complaint: first, presence of a broken chain in shifting hands of items exhibited in PE.1 from the store officer to the primary court and PW4. In order to substantiate the first reason, Ms. Paul cited the authority in **Ramadhani Mboya Mahimbo v. Republic**, Criminal Appeal No. 326 of 2017; second, the prosecutor in the case had tendered exhibit PE.1 contrary to the law in the precedent in **Amos Alexander @ Marwa v. Republic**, Criminal Appeal No. 513 of 2019. In substantiating her argument, Ms. Paul cited page 21 of the proceedings of the district court in the case which displays Bulemo Kisiki, a prosecutor in the case tendering exhibit PE.1. On this reason, Ms. Paul submitted the fault is fatal and exhibit PE.1 has to be expunged from the record.

On the third reason, Ms. Paul contended that there are contradictions in evidences produced by PW2 and PW3 on identification of trophies. According to Ms. Paul, PW2 testified that they arrested the accused person with two fore limbs as

displayed at page 24 of the proceedings of the district court whereas expert witness who identified and valuated the trophies, PW3 testified on two hind limbs and one tail of wildebeest. To Ms. Paul this is an obvious doubt that the prosecution cannot be said it has established its case.

Replying the protests registered against the findings of the district court in the case, Mr. Ibrahim conceded the appeal, but with different turn. According to him, all three (3) offences against the appellant were not established beyond reasonable doubt. Regarding the first offence, Mr. Ibrahim contended that the cited sections in count number one in the Charge Sheet do not create an offence. In bolstering his argument, he submitted that the offence unlawful entry into national park was enacted in marginal note and under section 26 (2) of the **Interpretation of Laws Act** [Cap. 1 R.E. 2019] (the Interpretation Act), marginal note is not part of the statute.

With count number two in the Charge Sheet, Mr. Ibrahim submitted that it is not enough for the Republic to testify arresting of accused persons in national parks. For the offence to be established, according to him, witnesses must identify specific boundaries in which the accused persons are arrested. In his opinion, PW1 and PW2 had failed to perform their duties in such

respect. In taking note of the protests of the appellant in the district court with regard to specific boundaries, Mr. Ibrahim stated that the appellant, during cross examination in the district court, as displayed at page 22 of the proceedings, he complained on location of his arrest. According to Mr. Ibrahim, this makes an inference that the appellant doubted the scene of the crime.

Finally, Mr. Ibrahim argued that the issue of government trophies has occupied a large portion of conversations during the proceedings in the district court and this court. According to Mr. Ibrahim the prosecution had failed to establish the two animal legs and tail were government trophies from wildebeest. In supporting his argument, Mr. Ibrahim submitted that PW3 was summoned as expert witness in the district court to establish that the meat was actually government trophies. However, he failed to properly identify and evaluate the alleged trophies. Mr. Ibrahim cited page 31 of the proceeding where PW3 just stated he identified and evaluated two hind limbs and tail to government trophies without going further to distinguish wildebeest meat and any other domestic cows' meat.

I have consulted the proceedings of the district court in the case. The proceedings shows that the appellant on 1st September 2021 was arraigned before the district court to reply

the indicated offences, but had pleaded not guilty to all the three (3) offences. In order to establish the offences against the accused person, the prosecution had summoned four (4) witnesses and three (3) exhibits namely: Edes Shayo (PW1); Johnson Minja (PW2); Njonga Michael (PW3); and WP.9755 D/C Emmaculata (PW4), and exhibits: Certificate of Seizure (PE.1); Trophy Valuation Certificate (PE.1); and Inventory Form (PE.3). After full hearing of the case, the district court had convicted the appellant with all three offences and accordingly sentenced him to pay 300,000 Tshs. or in default to serve twelve (12) months imprisonment for each count in the first and second whereas for the third count to serve twenty (20) years imprisonment.

The evidences of arresting officers, park rangers, PW1 and PW2, as displayed at page 19 and 23 of the proceedings show, in brief, that:

> **PW1:** *on 8/9/2020, I was on patrol with my fellow officers at Tindigani area within Serengeti National Park. My fellows were Johnson Minja and Paulo... We saw foot prints of human being...we went near a bush and we heard as if someone was cutting. We surrounded the said bush...and arrested him...we found him with fresh trophies.*

PW2: *on 8/9/2020, I was in patrol with my fellow officers within Serengeti at Tindigani area. I was with Edes Shayo and Paulo Ochieng. Then we saw human footsteps, which was not normal in national park as it alerted us on illegal acts by illegal people...we followed the footsteps and they led us to a bush. We heard movements therein... and arrested him. We found him with fresh trophies.*

It is this evidence of PW1 and PW2 which proved the appellant was arrested in the Serengeti National Park within Tarime District in Mara Region. However, the current practice of the Court of Appeal (the Court) in the precedent of **Maduhu Nhandi @ Limbu v. Republic**, Criminal Appeal No. 419 of 2017, shows, at page 18 and 19 of the judgment, that:

> *...considering the uncertainty of the testimonies of PW1 and PW2 concerning the exact place where the appellant and another were arrested within the boundaries of the Serengeti National Park as stipulated by the law,* ***we have no hesitation to state that the appellant defence raised reasonable doubt on whether he was arrested within the boundaries of SENAPA****. To this end,* ***the doubt had to be resolved in his favour by both the trial and first appellate courts.***

In the case of ***Chenyonga Samson Nyambare v. The Republic, Criminal Appeal No. 510 of 2019****, in which the prosecution did not explain beyond reasonable doubt if truly the area in which the appellant was found grazing cattle was within Serengeti National Park, the Court stated that: since Ikorongo game reserve boundaries are statutorily defined, the evidence on record must place the appellant inside statutory limits of the reserve.* ***It will not suffice to shift the burden to the accused person, where PW1 and PW2 merely narrate the game scout arrested the appellant inside Ikorongo Game Reserve without demonstrating the area of the arrest of the appellant to be within the statutory boundaries of that reserve****.* (Emphasis supplied).

Similarly, in the case of **Michael Molenda @ Nyahegere & Another v. Republic**, Criminal Appeal Case No. 107 of 2021, this court had noted that a park ranger of Tanzania National Park (TANAPA) at Serengeti National Park (SENAPA), Mr. Amani Gidion @ Mbwambo narrations, at page 10 of the proceedings of the district court in the case, had failed to place the appellant inside statutory limits of the SENAPA. The testimony, in brief, showed that:

On 5th November 2020 at about 11:00 hours at ***Nyakitapembe area in Serengeti National Park within Serengeti District in Mara Region****, I and fellow rangers, Venance Muhomi, Johnson Monja, Paulo Zuo and Steven Sabai, we saw two persons into the bush, surrounded there and managed to arrest them.*

(Emphasis supplied).

The testimony of Mr. Amani Gidion @ Mbwambo in the cited case was supported by Mr. Venance Muhoni, but also was not suitable from the same requirement. His testimony that:

On 5th November 2020 at about 11:00 hours at ***Nyakitapembe area in Serengeti National Park within Serengeti District in Mara Region****, I and fellow rangers, Paulo Zuo, Amani Mbwambo, Steven Sabai, were at patrol and saw two persons into the bush. [We] surrounded there and managed to arrest both.*

(Emphasis supplied).

From the record of appeal, it is obvious that PW1 and PW2 produced general statement on where they have arrested the appellants without showing the statutory limits described in the First Schedule to the National Parks Act. The prosecution had to prove the allegations by demonstrating the particular place

which fell within the statutory boundaries of SENAPA. Regrettably, this was not accomplished by the prosecution at the district court during the hearing of the case. The remedy is such circumstances is obvious (see: **Maduhu Nhandi @ Limbu v. Republic** (supra) and **Michael Molenda @ Nyahegere & Another v. Republic** (supra).

I am also quietly aware on the position of the law as of current with regard to the amendment which were brought by the **Written Laws (Miscellaneous Amendment) Act No. 11 of 2003** and interpretation of the Court in the precedent of **Willy Kitinyi @ Marwa v. Republic**, Criminal Appeal No. 511 of 2019. The Court in the cited precedent, at page 10 of the judgment, noted that:

> *We instantly agree with Mr. Temba that in relation to the first count, the appellant was charged with and convicted on a non-existing offence, because section 21 (1) (a) (2) of the NPA does not create the offence of unlawful entry. 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 v. Republic****, Criminal Appeal No. 512 of 2019, we faced a similar situation and 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.*

(Emphasis supplied).

Following this statement of our superior court, it is obvious that the offence of unlawful entry into national parks contrary to section 21 (1) (a) & (2) of the Act cannot be prosecuted in our courts, unless the law is amended to enact the *actus reus* of the offence. I think Mr. Ibrahim is right on his submission. The offence does not exist hence the appellant should have not have been prosecuted and held responsible for the offence.

There is a large family of precedents in favour of the preposition (see: **Mahende Gitocho @ Mahenda v. Republic**, Criminal Appeal Case No. 159 of 2021; **Mathias Maisero @ Marwa & Another v. Republic**, Criminal Appeal No. 104 of 2021; **Jona Mosi @ Masoya v. Republic**, Criminal Appeal Case No. 144 of 2021; **Mayongera Mayunga @ Mayongera v. Republic**, Criminal Appeal Case No. 134 of 2021; **Masagali Mebacha @ Mazanzu v. Republic**, Criminal Appeal No. 158 of 2020; **Peter Matoroke @ Rante v. Republic**, Criminal Appeal No. 149 of 2020 and **Michael Molenda @ Nyahegere & Another v. Republic** (supra).

The case at the district court also witnessed a prayer of its kind from the prosecution side in search of soft landing. A person named Bulemo Kisika, appeared in the case as prosecutor. However, during the proceedings prayed to tender and actually tendered a Certificate of Seizure and was admitted as PE.1. The incidence was recorded at page 21 of the typed proceedings of the case. The exhibit PE.1 is a proof that the appellant was found at the scene of the crime with the listed government trophies and weapons. The Court in its sitting at Musoma on 29th October 2021, had an opportunity to deliberate an instance, like the present one, in the precedents of **Amos Alexander @ Marwa v. Republic** (supra). Reading page 13 to 15 of the judgment, the following extract, may be appreciated in this judgment:

> *Under the general scheme of the CPA, particularly section 95, 96, 97, 98 and 99 thereof, it is evident that the key duty of a prosecutor is to prosecute. A public prosecutor is not a witness sworn to adduce evidence and cannot assume the role of a witness. He is not competent to tender exhibits because he cannot ride two horses at the same time, be a prosecutor and a witness at the same time. This course of action is fatal*

*(see: **Thomas Ernest Msungu @ Nyoka Mkenya v. Republic**, Criminal Appeal No. 78 of 2012, **Sospeter Charles v. Republic**, Criminal Appeal No. 555 of 2016, **Tizo Makazi v. Republic**, Criminal Appeal No. 532 of 2017, **DPP v. Festo Emmanuel Msongaleli and Nicodemu Emmanuel Msongaleli**, Criminal Appeal No. 62 of 2017. We have maintained that when a prosecutor tenders an exhibit, he assumes the role of a witness and in the process the prosecutor is not capable of being examined and cross examined (see: **Thomas Ernest Msungu @ Nyoka Mkenya v. Republic**, (supra). In this appeal, the prosecutor could not be examined or cross -examined by the appellant on said exhibit.*

With the available remedies, the Court at page 14, stated that:

Basing on the discussed authorities above, we expunge exhibit P.E.3 from the record of appeal. Similarly, in the complaint on the PW5's statement, that its admission into evidence offended the Evidence Act [Cap 6 R.E. 2002], the public prosecutor tendered the statement of an independent witness one Agnes Charles Marwa (PW5) under section 34B of the Evidence Act because

the prosecutor could not secure her appearance in court to testify for the prosecution case. The same applies to this statement of PW5, the prosecutor cannot be a prosecutor and a witness at the same time as we discussed above. We therefore expunge the statement of PW5 from the record.

I think this court has to follow the course of the Court. I have therefore decided to expunge exhibit PE.1 from the record. As the crucial exhibits PE.1 has been expunged, the prosecution case cannot stand to prove that the appellant was found in possession of government trophies. Cumulatively, all the defects in the evidence lead to the conclusion that the appellant's appeal has merit. The complaint of the applicant in the final ground of appeal was brought in this court with good reasons. Therefore, I allow the appeal as the prosecution evidence failed to prove the charge beyond reasonable doubt against the appellant.

In criminal cases, the burden of proof lies on the prosecution and it never shifts to the accused person (see: section 3 (2) (a) of the **Evidence Act** [Cap. 6 R.E. 2019] and **Amos Alexander @ Marwa v. Republic** (supra). In my opinion, the remaining issues which arose during the submissions of

learned counsels Ms. Paul and Mr. Ibrahim, becomes redundant. In the end, and considering the forgoing adduced reasons, the appeal against the appellant succeeds. We quash the conviction, set aside the sentence and order his immediate release from prison unless he is otherwise lawfully held.

It is so ordered.

Right of appeal explained to the parties.

F. H. Mtulya

Judge

21.09.2022

This judgment was delivered in chambers under the seal of this court in the presence of learned State Attorney, Mr. Isihaka Ibrahim and in the presence of the appellant, Mr. Mwera Nyakengwena @ Mwita and his learned counsel Ms. Naomi Paul, through teleconference placed at this court in Tarime District of Mara Region, Kwitanga Prison in Kigoma and in the offices of the Director of Public Prosecutions, Musoma in Mara Region.

F. H. Mtulya

Judge

21.09.2022