**IN THE COURT OF APPEAL OF TANZANIA**

**AT MBEYA**

**(CORAM: MMILLA, J.A., MKUYE, J.A., And MWANGESI, J.A.)**

**CRIMINAL APPEAL NO. 276 OF 2017**

**D.P.P ........................................................................................ APPELLANT**

**VERSUS**

**1. NGUSA KELEJA @ MTANGI**
**2. CHARLES MTOKAMBALI ........................................RESPONDENTS**

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

**(Mgetta J.)**

**Dated the 25th day of July, 2016**
**in**
**Criminal Appeal No. 32 of 2016**

**.............**

# JUDGMENT OF THE COURT

1st & 11th June, 2020

**MMILLA, JA.:**

In this appeal, the Director of Public Prosecutions (the DPP/appellant), is challenging the judgment of the High Court of Tanzania, Sumbawanga Registry, dated 25.7.2017 in Criminal Appeal No. 32 of 2016 vide which it reversed the decision of the Resident Magistrate's Court (the trial court), in Criminal Case No. 126 of 2016.

Before the trial court, Ngusa Keleja @ Mtangi and Charles Mtokambali (the first and second respondents respectively), were jointly and together charged with the offence of grazing cattle in the game reserve area contrary to section 18 (2), (4) and 111 (1) (a) of the Wildlife Conservation Act No. 5 of 2009 (WCA). It was alleged before the trial court that on 25.3.2016, the respondents were jointly and together found unlawfully grazing seven hundred and eighty cows (780) in Rukwa Game Reserve Area. Despite protesting their innocence, the trial court convicted them and sentenced each to pay a fine of Tzs. 500,000/=, in default of which they were to serve two (2) years' imprisonment. In addition to that, all the 780 herds of cattle were forfeited to the Government. Aggrieved by that decision and the resultant orders, the respondents successfully appealed to the High Court as a result of which it quashed conviction, set aside the sentences, and vacated the orders for forfeiture. In turn, that decision aggrieved the appellant, hence the present appeal to the Court.

The background facts of the case are not complicated. It was common ground that the respondents were pastoralists, and were

owners of the herds of cattle which were the subject of the charges against them.

On 24.3.2016, a game ranger one Said Habibu (PW1), was on patrol at Itumba area within Rukwa/Lwafi Game Reserve. He claimed to have been reliably informed that there were people grazing cattle in the game reserve area. He organized his colleagues whereupon on 25.3.2016, they went into that area in search of the law breakers. They came across a big kraal in the area which enclosed a big number of cows. They managed to arrest two persons; Shigela Mayunga and Haruna Norbert. They interrogated them; they were told that the herds of cattle belonged to Charles Mtokambali and Ngusa Keleja. With the assistance of Shigela Mayunga and Norbert Haruna, the herds of cattle were driven to the game reserve Campsite.

On 16.4.2016 Shigela Mayunga and Charles Mtokambali reported at Majimoto Police Station and informed them that they were the owners of the herds of cattle which were seized by the game rangers. They counted the cows twice; the final of which was witnessed by Evarist Chawila (PW2) who was the Village Executive Officer (VEO) of

Ilanga village, and Ast/Insp. Omari Wawa (PW4). It was established that Ngusa had 303 cows, whereas Charles had 477 of them, thus bringing the total number to 780 of them. They were eventually charged with the said offence.

In their defences, the respondents testified in common that their herds of cattle were seized at Kipa village near River Kavuu and Lake Rukwa, an area which was outside the game reserve area. They contended that they were later on informed by the District Commissioner of Mlele District that Kipa village had been dissolved and became part of the game reserve. Unfortunately, they maintained, the move to declare Kipa village as part of the game reserve area was not made known to the Kipa villagers and the public in general, themselves inclusive. They contended therefore that at the time of grazing in that village, they believed they had the right to graze in that erea.

In overturning the decision of the trial court, the first appellate court found that there was no sufficient evidence to show that the game rangers found the herdsmen grazing their cattle in the game

reserve area, nor that they arrested them inside the game reserve. Also, the first appellate court castigated the prosecution for failure to call the two herdsmen; Shigela Mayunga and Haruna Norbert whom it said were crucial witnesses in the case. It further found that the respondents had raised a reasonable doubt, which was all what they were duty bound to do, that their herds of cattle were seized at Kipa village and not in the game reserve area; further that there was no evidence from the prosecution side to show that Kipa village was dissolved and it had become part of the game reserve area. For those reasons, the first appellate court felt justified to allow the appeal as it were.

During the hearing of the appeal on 01.06.2020, the appellant was represented by Mr. Renatus Mkude, learned Principal State Attorney who was assisted by Mr. Achiles P. Mulisa, learned Senior State Attorney. On the other hand, the respondents enjoyed the services of Mr. Mathias Budodi and Mr. Musa Lwila, learned advocates. On the basis of the Court's direction in its ruling of 01.11.2019, the

DPP filed a supplementary memorandum of appeal which raised four grounds as follows:-

1. That, the first appellate judge erred in law in not holding that failure by the respondents to cross examine the key prosecution witnesses on incriminating issues and facts, such issues and incriminating facts are deemed to have been accepted and uncontroverted.
2. That, the first appellate judge erred in law in not holding that the lies by the second respondent during trial corroborated the prosecution evidence.
3. That, the first appellate judge erred in law by not holding that the respondents' defences were an afterthought.
4. That, the first appellate judge erred in law in not holding that the circumstantial evidence as adduced during trial pointed a guilty finger to both respondents.

In view thereof, the Court is being requested to allow the appeal, set aside the orders made by the first appellate court, and confirm the orders of the trial court.

The submission in support of the appellant's appeal was marshaled by learned Senior State Attorney Mr. Mulisa. He proposed and argued the first and second grounds together.

In his submission, the learned Senior State Attorney contended that after receiving information on 24.3.2016 that certain people were spotted grazing in the game reserve, on 25.3.2016 PW1 and PW3 together with ten (10) other game rangers patrolled the area and came across a kraal at Itumba which enclosed a big number of cattle and arrested two persons; Shigela Mayunga and Norbert Haruna who told them that they were four of them but their colleagues namely, Ngusa Keleja and Charles Mtokambali (the respondents) ran away. Assisted by the said Shigela Mayunga and Norbert Haruna, the herds of cattle were driven to the Campsite within the game reserve. Mr. Mulisa submitted as well that the respondents' assertion in their respective defences that the herds of cattle were seized by the game

rangers at Kipa village is a lie because had it been true, and it being a very important point, their advocates would have cross examined PW1 and PW3 on that aspect, but they did not. He elaborated that they were expected to have cross examined those witnesses in a bid to build a base that the kraal at which the herds of cattle were found was not in the game reserve area; so also, matters regarding the allegations of their cattle having been forced by the game rangers to cross River Kavuu into the game reserve. Since they did not cross examine those witnesses along those lines, their testimonies that the herds of cattle were seized at Kipa village were an afterthought and ought to have been rejected. He relied on the cases of **Paul Anthony v. Republic**, Criminal Appeal No. 189 of 2014 and **Athuman Rashid v. Republic,** Criminal Appeal No. 264 of 2016 (both unreported). In these two cases, the Court expounded in common that where a party fails to cross examine a witness on a certain matter; he is deemed to have accepted that matter and will be estopped from asking the trial court to disbelieve what the witness said.

On another point, Mr. Mulisa submitted that the second respondent had two versions in his defence as to when he last visited the place where his cows were kept. His first version appearing at page 40 of the Record of Appeal was that he last went to where his cows were kept on 24.3.2016. His second version was that he saw his herds of cattle once again on 25.3.2016 when they were being driven from Kipa village across River Kavuu into the game reserve. According to Mr. Mulisa, those two versions exposed DW2 as a liar, therefore that the first appellate court ought to have not believed him. He secured his stand by citing to us the case of **Twaha Elia Mwandungu v. Republic** [2000] T.L.R. 277 in which the Court said at page 286 that although a conviction cannot be based on the accused person's lies, but if material, such lies may be taken into account in determining whether the alleged guilt of the accused has been proved. Mr. Mulisa prayed the Court to find that the herds of cattle subject of the charge from which this appeal stems were seized at Itumba in the game reserve area and not at Kipa village as is being

claimed by the respondents because their defences were nothing but an afterthought.

On another point, Mr. Mulisa submitted that the first appellate court did not consider all the evidence on record regarding the distance from the place where the kraal was erected to River Kavuu and Lake Rukwa etc. He stressed that the first appellate judge totally failed to consider the evidence of PW3 on the point, adding that he ought to have also considered the fact that the herdsmen were moving within the game reserve from one place to another, therefore that it was not easy to see the said cattle being grazed in the said area, particularly so when it is considered that the game reserve is in the forest, coupled with tall grasses.

The last ground of appeal alleges that the first appellate judge erred in law in not holding that the circumstantial evidence as adduced during trial pointed a guilty finger to both respondents. On this, Mr. Mulisa submitted that the first appellate judge's interpretation of section 18 (2) of the WCA was problematic or literal and was misleading because although the respondents were not arrested in the

game reserve, they were constructively responsible because their herds of cattle were found in the game reserve. He urged the Court to allow the appeal, restore and confirm the orders which were made by the trial court.

When their turn to reply came, Mr. Budodi proposed to argue those grounds seriatim, starting with the first one which queries the respondents' failure to cross examine the prosecution witnesses on incriminating issues and facts, thus connoting that such issues and facts were accepted as representing the truth.

To start with, Mr. Budodi submitted that failure to cross examine alone does not entail that the accused is guilty, but that it all depends on whether or not the available evidence proves the case against the particular accused beyond doubt. Also, while admitting that the defence side did not cross examine PW1 on matters pertaining to the location of the kraal in which the herds of cattle were found; he nonetheless argued that they cross examined PW3 on those matters, a witness whose version of evidence was similar to that of PW1. He similarly contended that after all, the evidence of PW1 was

contradicted by PW3 on the aspect of how long they were at the Campsite before seizing the herds of cattle on 25.3.2016. While PW1 said they were there a week before they apprehended the said cows, PW3 said they apprehended them after a two weeks' stay at the Campsite. In view of that contradiction, Mr. Budodi said even if they did not cross examine PW1, his evidence was after all unreliable because it was not credible. Even, he went on to submit, the case of **Paul Anthony** (supra) was distinguishable to the present case because in that case, all the witnesses were not cross examined, whereas in the present case only PW1 was not cross examined.

As regards the second ground of appeal which queries that the first appellate judge erred in not holding that lies by the second respondent during trial corroborated the prosecution evidence, Mr. Budodi submitted that that court correctly declined to hold as such because there is nothing to show that the second respondent lied as claimed by his learned friend Mr. Mulisa. He asserted that the second respondent consistently told the trial court that he visited Kipa village on 24.3.2016 and saw his cows, but that after they were seized by the

game rangers on 25.3.2016, he once again rushed to that village after being emergently called by his herdsman. In the circumstances, he pressed the Court to dismiss this ground too.

As to the complaint in the third ground that the respondents' respective defences were an afterthought, Mr. Budodi was firm that his clients' defences were truthful, believable and reliable. He added that the respondents' respective testimonies that the cows were seized at Kipa village were supported by an independent defence witness one Rashidi Daudi Kalele (DW3). He similarly said that they were truthful when they said it was not possible for them to cross River Kavuu on foot, which is why, after forcing their cows to cross that crocodile infested river, the game rangers used a boat to cross that river, an advantage the respondents did not have. Thus, Mr. Budodi persuaded us to dismiss this ground too.

Concerning the fourth ground that the first appellate judge erred in law in not holding that the circumstantial evidence as was adduced during trial pointed a guilty finger on the respondents; Mr. Budodi submitted that this ground was misconceived because the question of

circumstantial evidence did not arise in the circumstances of this case. He clarified that the present case rested on direct evidence offered by eye witnesses. He urged the Court to likewise dismiss this ground.

Over all, for reasons he assigned, Mr. Budodi implored the Court to dismiss the appeal in its entirety and confirm the orders which were made by the first appellate court.

In a brief rejoinder, Mr. Mulisa reiterated his position that the herds of cattle were seized at Itumba area in the game reserve and not at Kipa village as strenuously claimed by the respondents. He insisted that the respondents' defences were an afterthought, and that the second respondent was a liar in as much as he said he went to Kipa on 25.3.2016 in the morning at which he purported to have seen the game rangers forcing the cows to cross River Kavuu because the herds of cattle were seized in the game reserve and driven to the Campsite within that area. He recapitulated his prayer that we allow the appeal, set aside the orders which were made by the first appellate court, and confirm those which were made by the trial court.

We have sensibly considered the rival arguments of counsel for the parties. Having closely scrutinized the grounds of appeal raised, we crave to firstly discuss the first three of them together due to their relatedness, and the fourth one separately.

The controversy between the two sides in the present case orbits on where exactly due to their relatedness the respondents' herds of cattle were impounded. This is because as previously pointed out, while PW1 and PW3 testified that they seized the respondents' herds of cattle in a kraal at Itumba area in the game reserve, in their defences the respondents commonly testified that their herds of cattle were seized at Kipa village outside the game reserve, after which the game rangers forced them to cross River Kavuu into the game reserve. This being the position, we agree with Mr. Mulisa that these two aspects constituted crucial points which ought to have made the respondents cross examine the two key prosecution witnesses in the case; PW1 and PW3. This is particularly so when we consider that it is the obligation of the defence counsel, both in duty to his client and as officer of the court, to indicate in cross examination the theme of his

client's defence so as to give the prosecution an opportunity to deal with that theme – See the case of **Mohamed Katindi v. Republic** [1986] T.L.R. 134 cited in **John Madata v. Republic**, Criminal Appeal No. 453 of 2017 (unreported). Certainly, where an accused person and/or advocate fails to cross examine on important points, the court may deem that such a person has accepted that matter and may be estopped from asking the trial court to disbelieve what any particular witness may have said. That is indeed what was commonly stated in the cases of **Athuman Rashid** and **Paul Anthony** (supra) relied upon by Mr. Mulisa.

That notwithstanding however, we agree with Mr. Budodi that though they did not cross examine PW1 in that regard; they nevertheless cross examined PW3 whose version of evidence was similar to that of PW1. This is reflected at page 25 of the Record of Appeal at which they raised matters relating to whether or not it was possible to drive the herds of cattle across the crocodile infested River Kavuu into the game reserve. In the circumstances, we are reluctant to infer that the respondents accepted that the herds of cattle were

seized in the game reserve, also that they were liars. This is particularly so when we consider their respective testimonies that their herds of cattle were at Kipa village and not at Itumba, a version which was corroborated by DW3 who was an independent witness for the defence.

As correctly submitted by Mr. Budodi, the respondents' defences raised a reasonable doubt, which is all what they were in law duty bound to do. In fact, as was correctly found by the first appellate court, this was compounded by the prosecution's failure to call two witnesses, Shigela Mayunga and Norbert Haruna whom, contrary to what Mr. Mulisa says, we consider them to have been crucial witnesses because they were there when the respondents' herds of cattle were seized. Thus, they could have testified regarding where exactly the herds of cattle were found and impounded by PW1 and PW3.

We take note that Mr. Mulisa raised a complaint in the course of his submission about first appellate judge's failure to consider all the evidence on record regarding the distance from the place where the

kraal was erected to River Kavuu and Lake Rukwa etc, also that he ignored to consider the evidence of PW3 on that point. Regrettably however, we do not intend to address that complaint because it was not a ground of appeal. In the circumstances, we ignore the same.

We now pose to restate the basic principle of law that the burden of proof in criminal cases lies squarely on the prosecution shoulders, the standard of which is beyond reasonable doubt – See **Woolmington v. DPP** (1935) AC 462 and Mohamed **Said Matula v. Republic** [1995] T.L.R. 3. An accused has no duty of proving his innocence, and in making a defence, an accused is merely required to raise a reasonable doubt. We must add here that even, the accused person can only be convicted on the strength of the prosecution case and not on the basis of weakness of his defence – See **Mohamed Haruna @ Mtupeni & Another v. Republic,** Criminal Appeal No. 25 of 2007 (unreported). In the just cited case of **Mohamed Haruna @ Mtupeni**, the Court explicated that:-

> *"Of course, in cases of this nature the burden of proof is always on the prosecution. The*

> *standard has always been proof beyond reasonable doubt. It is trite law that an accused person can only be convicted on the strength of the prosecution case and not on the basis of the weakness of his defence."*

See also the case of **Mwita and Others v. Republic** (1977) L.R.T. 54 in which the Court said that:-

> *"The appellants' duty was not to prove that their defences were true. They are simply required to raise a reasonable doubt in the mind of the magistrate and no more."*

Likewise, we do not agree with Mr. Mulisa that the second respondent made any lies. He was recorded at page 40 of the Record of Appeal to have said in examination in chief that he last saw his herds of cattle on 24.3.2016 when he went to Kipa to collect milk for consumption, and also to send flour and pay wages to his herdsman. Of course, he was similarly recorded at that same page to have said that on 25.3.2016, his herdsman called him and informed him that the game rangers seized his cattle, whereupon he rushed to Kipa, on arrival of which he saw the game rangers forcing his herds of cattle to

cross River Kavuu. In our firm view, his version of 25.3.2016 was an expression that his going there was prompted by the emergency call made by his herdsman. In the circumstances, we do not find anything inexplicable to consider him as a liar.

Equally, it is true that the respondents testified in common that it was impossible to cross River Kavuu because it was infested with crocodiles, but the second respondent was heard saying at a later stage that he saw the game rangers forcing the cows to cross River Kavuu. Mr. Mulisa capitalized on that statement that the second respondent was a liar. With all due respect to the learned Senior State Attorney, we do not agree with him.

In the first place, in a fit case that statement qualifies to be a contradiction rather than a lie whose effect may be to weaken his defence. This is because it entails two opposing versions. Even, we do not consider it a lie because it is not pregnant with elements of lies. Besides, the second respondent enlightened the trial court that the rangers directed the cows into crossing the river, but they themselves used a boat to cross it, which means it was a dangerous river just as

he had earlier on said. Thus, the allegation that the respondents' defences were an afterthought, or that the respondents were liars, hence that all what they said in their defences were an afterthought, is without foundation. The first, second and third grounds are baseless and are hereby dismissed.

The fourth ground alleges that the first appellate judge erred in law in not holding that the circumstantial evidence as was adduced during trial pointed a guilty finger on the respondents. This ground need not unnecessarily detain us because we are convinced it is misconceived.

As correctly submitted by Mr. Budodi, the question of circumstantial evidence did not arise in the circumstances of this case because the prosecution case in this matter rested entirely on direct evidence which was given by eye witnesses. There is nothing at all to suggest the prevalence of circumstantial evidence worth a consideration as suggested by Mr. Mulisa. Consequently, this ground too lacks merit and is hereby dismissed.

For reasons we have assigned, this appeal is devoid of merit. We therefore dismiss it in its entirety and confirm the orders of the first appellate court.

Order accordingly.

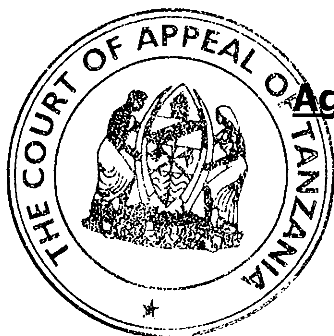
**DATED** at **DAR ES SALAAM** this 9th day of May, 2020.

B. M. MMILLA
**JUSTICE OF APPEAL**

R. K. MKUYE
**JUSTICE OF APPEAL**

S. S. MWANGESI
**JUSTICE OF APPEAL**

The Judgment delivered 11th day of June, 2020 in the presence of Mr. Novatus Mkude, learned Principal State Attorney for the Appellant/Republic and Mr. Mathias Budodi assisted by Mussa Lwila, learned counsel for respondent is hereby certified as a true copy of the original.




E. K. NKYA
**Ag. SENIOR DEPUTY REGISTRAR**
**COURT OF APPEAL**