IN THE COURT OF APPEAL OF TANZANIA

AT MUSOMA

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

CRIMINAL APPEAL NO. 507 OF 2019

NYAKWAMA s/o ONDARE @ OKWARE..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Ng'umbu, RM EXT.JUR)

Dated the 17th day of October, 2019
in
Criminal Appeal No. 16 of 2019

JUDGMENT OF THE COURT

18th & 21st October, 2021

WAMBALI, J.A.:

On 16th January, 2018 the appellant, Nyakwama s/o Ondare @ Okware was initially arraigned before the District Court of Serengeti at Mugumu as an inquiry court where he faced three counts comprising economic and non economic offences. The first count was in respect of unlawful entry into the Game Reserve contrary to Section 15(1) and (2) of the Wildlife Conservation Act, No.5 of 2009, Cap. 283 (the WCA). It was alleged in the particulars of the offence in respect of the first count that on 12th January, 2018, the appellant entered into the Game Reserve at Mto Mukomure area within Serengeti District in Mara Region, without the permission from the Director of Wildlife (the Director).

The second count concerned unlawful possession of weapons in the Game Reserve contrary to section 17(1) and (2) of the WCA 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 (now R. E. 2019). It was plainly laid in the particulars that on the same date and place stated above, the appellant was found in possession of a weapon; namely, one machete (panga) and that he failed to satisfy the authorized officer that the said weapon was intended to be used for purposes other than hunting, killing, wounding or capturing of wild animals.

Lastly, the third count involved unlawful possession of Government trophy contrary to section 86(1) and (2) (c) (iii) of the WCA as amended by Act No.2 of 2016 read together with paragraph 14 of the First Schedule to the EOCCA as amended by the Written Laws (Miscellaneous Amendments) Act No.3 of 2016. The particulars of the offence were to the effect that on the same date and place stated above, the appellant was found in unlawful possession of six pieces of dried wildebeest meat valued at TZS. 1,430,000.00 the property of the United Republic of Tanzania.

Noteworthy, on that particular date he was not required to take plea to the charge which was read over and explained to him. However, on 21st

February, 2019 he was formerly called upon to plead to the charge before the same court after the Director of Public Prosecutions (the DPP) acting under section 12(4) of the EOCCA issued a certificate conferring jurisdiction on that court to try economic and non-economic offences that faced the appellant.

As it were, the appellant pleaded guilty to the first count and thus he was convicted and sentenced to pay a fine of TZS. 500,000.00 or three years imprisonment in default. Notably, according to the record of appeal there is no indication that he paid the fine hence he continued serving the imprisonment term.

In the circumstances, the trial of the appellant proceeded for the second and third counts in which he pleaded not guilty. To support the case in respect of the two counts, the prosecution side summoned four witnesses, namely; Rugatiri Gambachere (PW1), Adamu Jimmy @ Kitogoro (PW2), Wilbroad Vincent (PW3) and G. 3694 DC Shaban (PW4). In addition, three exhibits, namely; one panga, Trophy Valuation Certificate and Inventory of claimed property were tendered and admitted as exhibits PE2, PE3 and PE4 respectively. In short, the substance of the prosecution evidence was that on the material date and place alluded to above, the appellant was unlawfully found in possession of the weapon in the game

reserve and six pieces of dried meat of wildebeest the property of the United Republic of Tanzania without permit.

On his part, the appellant who defended himself, denied to have been involved in the alleged offences on 12th January, 2018. On the contrary, he testified that on 11th January, 2018 together with his friend Josephat Magige he had gone to Mto Mukomure area to graze cattle belonging to one Jora Padri and at around 19.00 hours while on his way back home, he saw a vehicle from behind and he stopped it for purpose of asking for a lift. Unfortunately, he testified, when it stopped, the Game Scouts who were in that vehicle suspected him to have been grazing in the game reserve, and they thus searched him whereby he was found in possession of the mobile phone make Itel, one stick and one machete. He testified further that after the said search they arrested him and proceeded to the camp and later to the police station at Mugumu before he appeared at the District Court of Serengeti on 12th January, 2018 in connection of the offence alluded to above. He maintained that he was surprised to be charged with being found in possession of the alleged Government trophy while the prosecution did not tender the certificate of seizure to substantiate the allegation.

Nonetheless, at the height of the trial, the trial learned Resident Magistrate believed the prosecution version of evidence; hence it convicted the appellant on both counts and sentenced him to imprisonment for two and twenty years respectively.

The appellant unsuccessfully appealed against the convictions and sentences as the appeal which was heard and determined by the Court of Resident Magistrate of Musoma exercising extended jurisdiction was dismissed it in its entirety, hence the instant appeal.

To express his disagreement with the decision of the first appellate court, the appellant has lodged a memorandum of appeal containing five grounds of appeal. However, for the reason which will be apparent shortly, for the purpose of our judgment, we do not intend to extensively reproduce or recite the respective grounds herein.

The hearing of the appeal proceeded in the remote presence of the appellant in person, unrepresented as he was linked by a video conference facility between Musoma Prison and the court room.

On the other side, the respondent Republic was represented by Mr. Valance Mayenga learned Senior State Attorney assisted by Mr. Yesse Temba and Mr. Roosebert Nimrod Byamungu, learned State Attorneys.

At the very outset, after the appellant adopted his grounds of appeal and indicated his desire to let the counsel for the respondent Republic respond to his appeal, Mr. Byamungu registered the Republic's resolve to support the appeal, but for reasons not contained in those grounds of appeal.

We note that the thrust of Mr. Byamungu's support to the appellant's appeal is on the argument that the first appellate court did not at all consider the grounds of appeal in the petition of appeal which were placed before it for determination. In this regard, placing reliance on the decision of the Court in **Simon Edson @ Makundi v. The Republic**, Criminal Appeal No.19 of 2017 (unreported), Mr. Byamungu submitted that as the omission is fatal, the judgment of the first appellate court is a nullity. To this end, he implored us to invoke the provisions of section 4(2) of the Appellate Jurisdiction Act, Cap 141 R. E. 2019 (the AJA) to revise and nullify the judgment and thereby; either remit the file in respect of Criminal Appeal No.17 of 2017 before the first appellate court to compose a judgment comprising the determination of the appeal based on the grounds of appeal or step into its shoes and determine the appeal in accordance with the law.

However, Mr. Byamungu urged us to consider the interest of justice by going along with the second prayer of stepping into the shoes of the first appellate court by considering the undetermined grounds of appeal and arrive at the conclusion on the merit or otherwise of the appeal. Indeed, in his view, considering the factual setting in the record of appeal, the prosecution evidence which was placed before the trial court was marred by several irregularities which made the case against the appellant not to have been proved to the required standard. In essence, he supported the appellant's appeal.

Submitting in support of the appeal, the learned State Attorney argued that firstly, though the DPP had not issued a certificate conferring jurisdiction to the District Court of Serengeti, according to the record of appeal, on 16th January, 2018, when the appellant was initially arraigned and was not required to plea, the prosecution side tendered six pieces of dried meat of wildebeest which was admitted as exhibit PE1. In his submission, that was a serious irregularity as that court had no jurisdiction at that stage and thus, the said exhibit could not be relied in evidence to ground the appellant's conviction during the trial of the appellant.

Secondly, Mr. Byamungu submitted that exhibit PE2, PE3 and PE4 were tendered by the Public Prosecutor contrary to the requirement of the

law as he was not a witness. He therefore, requested the Court to expunge the respective exhibits from the record as they were wrongly introduced and relied upon as evidence by both the trial and first appellate courts to ground the conviction of the appellant. To support his argument, he referred the Court to the decision in **Athuman Almas Rajab v. The Republic**, Criminal Appeal No.416 of 2021 (unreported).

On the other hand, the learned State Attorney argued that though exhibit PE4 was wrongly tendered by the public prosecutor, close scrutiny of the said exhibit does not show that the appellant was involved in the process leading to the order of the magistrate for the destruction of the six pieces of dried meat of wildebeest contrary to the requirement of the law as emphasized by the Court in **Mohamed Juma @ Mpakama v. The Republic**, Criminal Appeal No.385 of 2017 (unreported).

In the circumstances, Mr. Byamungu argued that considering the weakness in the evidence of the prosecution case at the trial, if the exhibits are expunged from the record of proceedings of the trial court, the remaining oral evidence of the witnesses cannot support the case against the appellant. In this regard, he implored us to find that the prosecution case was not proved beyond reasonable doubt and thereby allow the appellant's appeal followed by an order of acquittal.

On the other hand, when we prompted the learned State Attorney as to whether the appellant's defence was considered by the two courts below, he readily conceded that in view of the record of appeal, there is no doubt that the appellant's defence was not considered at all. He submitted further that the trial court simply summarized the appellant's defence but did not analyse it against the prosecution evidence before it came to the conclusion that the case was proved beyond reasonable doubt. More importantly, he added, the first appellate court did not also consider the appellant's defence by subjecting it to that of the prosecution as required by law. To this end, placing reliance on the decision of the Court in **Hassan Mzee Mfaume v. The Republic** [1981] T.L.R. 167 he argued that failure of the first appellate court to consider the defence case is fatal as it is taken to have failed to revaluate the evidence and consider material issues involved in the appeal.

In the end, given the circumstances of the instant appeal, the learned State Attorney requested us to step into the shoes of the first appellate court to consider the appellant's defence and come to the conclusion on whether it raised reasonable doubt to the prosecution case. In the upshort, Mr. Byamungu reiterated his earlier stand of supporting the

appellant's appeal and prayed that the appeal be allowed resulting in the appellant's release from prison custody.

In his rejoinder, the appellant joined hands with the learned State Attorney in praying that the appeal be allowed.

Having heard the parties' submissions, at this juncture, we think, the first issue for our consideration is whether the appellant's grounds of appeal were considered and determined by the first appellate court.

After close scrutiny of the record of appeal, we entertain no doubt that in contesting the decision of the trial court, the appellant lodged before the first appellate court a petition of appeal comprising six grounds of appeal as reflected at pages 59-60. On the other hand, our careful perusal of the judgment of the first appellate court leads us to the finding that the learned Resident Magistrate with Extended Jurisdiction did not at all address and determine the grounds of appeal which were placed before him. On the contrary, with respect, he simply formulated his own issues which he termed as points for determination of the appeal though they were greatly not related to the appellant's complaints in his petition of appeal. Admittedly, non-consideration of the appellant's grounds of appeal was notwithstanding the fact that the appellant adopted them followed by the thorough response on each of the ground by the respondent Republic's

counsel. Besides, the learned State Attorney who appeared on that date strongly opposed the appellant's appeal in respect of the first, second and third counts.

We therefore, agree with Mr. Byamungu that failure to consider appellant's grounds of appeal was a fatal irregularity rendering the first appellate court's judgment a nullity. In this regard, we wish to emphasize that though it is not the duty of the first appellate court to resolve the issues as framed by the trial court, yet it is expected and bound to address and resolve the complaints of the appellant in the grounds of appeal either separately or jointly depending on the circumstances of each appeal. To this end, it is instructive, we think, to reiterate what the Court stated in **Malmo Montage Konsult AB Tanzania Branch v. Margret Gama**, Civil Appeal No.86 of 2001 (unreported) thus:-

> *"In the first place, an appellate court is not expected to answer the issues as framed at the trial. That is the role of the trial court. It is, however, expected to address the grounds of appeal before it. Even then, it does not have to deal seriatim with the grounds of appeal as listed in the memorandum of appeal. It may, if convenient, address the grounds generally or address the decisive grounds of appeal only or discuss each ground separately".*

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.

The next question to be answered by us is what should be the way forward. We have anxiously considered the circumstances of the appeal before us and in the interest of justice; we are inclined to the invitation by Mr. Byamungu to step into the shoes of the first appellate court to determine the appellant's grounds of appeal by re-evaluating the evidence in the record and come to our own conclusion.

In the premises, having scrutinized the appellant's complaints in the six grounds of appeal, we are of the considered opinion that the crucial question is whether the prosecution proved the case against the appellant beyond reasonable doubt.

To this question, firstly, we entirely agree with the submission of the learned State Attorney for the respondent Republic that the first appellate court erroneously confirmed the trial court's reliance on exhibit PE1 to ground the appellant's conviction because it was illegally tendered and admitted. There is no dispute that the said exhibit was tendered and admitted while the DPP had not issued consent to the prosecution of the appellant and the certificate conferring jurisdiction to the District Court of Serengeti to try the case involving economic and non-economic offences. We are mindful of the fact that exhibit PE1 was intended to support the prosecution case to the effect that the appellant was found in possession of six pieces of dried meat of wildebeest which was ordered to be destroyed by the Magistrate as it was in the danger of decaying before the trial started. We are also aware that exhibit PE4 (an inventory form) which indicated that the game meat had been ordered to be destroyed intended to achieve the same purpose. However, we are firm that exhibit PE4 could not be relied in evidence because; firstly, it was tendered by the public prosecutor contrary to the requirement of the law as correctly submitted by Mr. Byamungu.

Secondly, even if exhibit PE4 could have been tendered by a witness, still its authenticity was doubtful for two reasons. One, there is no evidence

as submitted by Mr. Byamungu that the appellant was involved in the process of seeking the order of destruction of the game meat before the Magistrate which is the requirement of the law as we affirmed in our decision in **Mohamed Juma @ Mpakama** (supra). Two, it is not clear on how the six pieces of dried meat of wildebeest which the Resident Magistrate of the District Court of Serengeti had ordered to be destroyed on 16th January, 2018 on the reason that it could not be stored as an exhibit was further tendered in court on the same day and admitted as exhibit PE1. Indeed, according to the record of appeal, it is not clear if the trial court ordered the disposal of exhibit PE1 before or after the conclusion of the trial of the case. In the premises, we expunge exhibit PE1 from the record.

Moreover, as to the status of exhibits PE2, PE3 and PE4, we entirely subscribe to the submission of Mr. Byamungu that they are liable to be expunged because they were wrongly tendered by the public prosecutor instead of the respective witnesses who were summoned by the prosecution to testify at the trial. For the purpose of emphasis on the settled position on the credibility and reliability of the exhibits tendered by a person who is not a witness (prosecutor), we find it pertinent to reiterate

what we stated in **Thomas Ernest Msungu @ Nyoka Mkenya v. The Republic**, Criminal Appeal No. 78 of 2012 (unreported) as hereunder:-

> *"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".*

The above settled position has been followed by the Court's decisions in **Sospeter Charles v. The Republic**, Criminal Appeal No. 555 of 2016 and **Tizo Makazi v. The Republic,** Criminal Appeal No. 532 of 2017 (both unreported), among others.

Similarly, in the case at hand, the prosecutor who tendered the exhibits could not be cross-examined on oath or affirmation on the respective exhibits. In the result, we equally expunge exhibits PE2, PE3

and PE4 for being illegally introduced into evidence and relied upon in convicting the appellant in respect of the second and third counts.

Having expunged the respective exhibits, what remains in the record is the oral evidence of PW1, PW2, PW3 and PW4. We have thus to consider that evidence against the defence of the appellant which was not considered as correctly conceded by Mr. Byamungu.

Before we embark in considering the appellant's defence, we must state that as a matter of law, the trial court is bound to evaluate the evidence of both the prosecution and defence side before it arrives to the conclusion of the case for and against the issues framed for determination. Indeed, if this task is not performed by the trial court, the first appellate court has an obligation to consider it and come to the conclusion; more so where failure to consider the appellant's defence is remarkably an issue in a given appeal. In the appeal at hand, we note from the record of appeal that the complaint on the failure of the trial court to consider the appellant's defence was vividly expressed in ground six of the petition of appeal. It is settled that failure to consider the party's defence is fatal as stated in **Hassan Mzee Mfaume** (supra), **Hussein Idd and Another v. The Republic**, [1986] TLR 166, **Rajab Abdallah @ Mselemu v. The Republic**, Criminal Appeal No.134 of 2014 and **Abel Marikiti v. The**

Republic, Criminal Appeal No.24 of 2015 (both unreported), among others. Particularly, in **Rajab Abdallah @ Mselemu** in which both lower courts did not consider the defence, the Court stated as follows:-

> *" .... As this Court has stated in different cases time and again, such omission constitutes a fatal error. To reiterate what has always been insisted in this regard, both courts below ought to have observed the well established principle of law that in writing a judgment, a court has to consider not only the evidence in support of one party's in a case and completely ignore the evidence for the other party, however worthless it may appear".*

Therefore, in the instant appeal, since the first appellate court did not consider the appellant's complaint on the failure of the trial court to consider his defence, and having nullified the impugned judgment, we now turn to consider it against the prosecution evidence by re-evaluating the evidence in the record of appeal as it was done in **Hassan Mzee Mfaume** (supra). By way of emphasis we think it is appropriate to reproduce what the Court stated in that appeal thus:-

> *(ii) A judge on first appeal should re-appraise the evidence because an appeal is in effect a re- hearing of the case;*
>
> *(iii) Where the first appellate court fails to re-evaluate the evidence and to consider material issues involved*

on a subsequent appeal ***the Court may re-evaluate the evidence in order to avoid delays or may remit the case back to the first appellate court."*** *[Emphasis Added]*

As we have intimated earlier on, the substance of the oral testimonies of PW1 and PW2 was to the effect that they arrested the appellant on 12th January, 2018 at Makomure area within the Game Reserve in possession of a panga and six pieces of dried meat of wildebeest. On the other hand, PW3 is the one who prepared the certificate of valuation (exhibit PE3) which we have expunged from the record. Moreover, PW4 simply supported PW1 and PW2 evidence that the offences were committed by the appellant on 12th January, 2018. Indeed, the thrust of his evidence was that he supervised the process of obtaining an order of destroying the six pieces of dried meat of wildebeest (exhibit PE1) and prepared the evaluation form (exhibit PE4), both of which we have expunged from the record. Therefore, the crucial evidence to be considered is that of PW1 and PW2 with regard to the date of arrest and the reason for the arrest of the appellant. On the other side, as we have alluded to above, in his defence, the appellant denied to have been arrested on 12th January, 2018 and that he was not in possession of the six pieces of dried meat of wildebeest.

Our perusal of the record indicates that after the appellant concluded his defence, he was not cross-examined by the prosecution on the validity of the contention that he was neither arrested on the particular date nor found in possession of the government trophy as alleged by the prosecution.

In the premises, we are of the considered view that failure of the prosecution to cross-examine the appellant on the two crucial issues which raised doubt to its case dented the findings of the two courts below that the case was proved beyond reasonable doubt. In the circumstances of this case, we subscribe to the position that as a matter of principle a party who fails to cross-examine on an important matter in the testimony of the adversary side is taken to have accepted what is stated by the said party. Instructively, in **Nyerere Nyague v. The Republic**, Criminal Appeal No. 67 of 2010 (unreported), the Court relied on the decisions in **Cyprian Kibogoyo v. The Republic,** Criminal Appeal No.88 of 1992 and **Paul Yusuf Nchia v. National Executive Secretary, Chama Cha Mapinduzi and Another**, Civil Appeal No.85 2005 (both unreported) and observed that:-

> *"As a matter of principle, a party who fails to cross-examine a witness on a certain matter is deemed to*

have accepted that matter and will be estopped from asking the trial court to disbelieve what the witness said".

Admittedly, in the instant appeal, as the prosecution side did not cross-examine the appellant's contention on his defence on the two issues alluded to above, which we think were crucial in determining his guilt or otherwise, it was estopped to deny the fact that the appellant had raised serious doubt to the evidence of PW1 and PW2 concerning the date of arrest and being found in possession of the dried meat of wildebeest at that particular place as laid in the charge sheet.

In this regard, had the trial and first appellate courts considered the appellant's defence against the prosecution evidence by subjecting it to a thorough analysis as we have done above, they would have certainly come to the conclusion that the prosecution case was not proved beyond reasonable doubt, as we hereby find.

Our finding on the failure of the two courts below to consider the defence case also leads us to entertain no doubt on whether the appellant unequivocally pleaded guilty to the first count of entering into the Game Reserve on the 12th January, 2018 as laid in the particulars of the charge. It follows that in the circumstances of evidence we have scrutinized above,

in which the appellant's contention that he was arrested on 11th January, 2018 while retiring from grazing out of the game reserve was not contested, it cannot be safely concluded that the prosecution fully substantiated the charge in respect of the first count.

In the final analysis, we allow the appeal, quash the convictions and set aside the sentences in respect of all counts. Ultimately, we order that the appellant be set at liberty immediately, unless otherwise held for lawful causes.

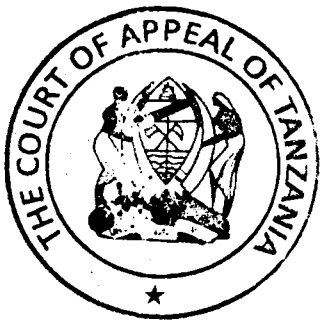
DATED at **MUSOMA** this 21st day of October, 2021.

I. H. JUMA
CHIEF JUSTICE

F. L. K. WAMBALI
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

The Judgment delivered this 21st day of October, 2021 in the presence of Mr. Frank Nchanila, learned State Attorney for the Respondent/Republic and the Appellant appeared remotely via Video link from Musoma is hereby certified as a true copy of the original.



K. D. MHINA
REGISTRAR
COURT OF APPEAL