IN THE COURT OF APPEAL OF TANZANIA

AT MUSOMA

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

CRIMINAL APPEAL NO 508 OF 2019

MOSI S/O CHACHA @ IRANGA ..... 1ST APPELLANT
MOKIRI S/O CHACHA ..... 2ND APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Judgment of Resident Magistrate's Court of Musoma (Extended Jurisdiction) at Musoma

(Ng'umbu, RM EXT. JUR.)

dated the 17th day of October, 2019

in

Criminal Appeal No. 27 of 2019

JUDGMENT OF THE COURT

20th & 22nd October, 2021

JUMA, C.J.:

The appellants, MOSI S/O CHACHA @ IRANGA and MOKIRI S/O CHACHA, were charged in the District Court of Serengeti at Mugumu with the first count of unlawful entry into the game reserve (Ikorongo Game Reserve) contrary to section 15(1) and (2) of the Wildlife Conservation Act No. 5 of 2009 (the WCA). The particulars of the first count alleged that on 11/03/2018, without

the permission of the Director of Wildlife, they entered the reserve at the Mto Rubanda area. This area is in the Serengeti District of the Mara Region.

The second count concerned unlawful possession of government trophies contrary to section 86(1) and (2) (b) of the WCA read together with paragraph 14 of the first schedule to the Economic and Organised Crime Control Act, Cap. 200 R.E. 2002 as amended by the Written Laws (Miscellaneous Amendments) Act No. 3 of 2016. The particulars of the second count were that on 11/03/2018, at the Mto Rubanda area within Ikorongo Game Reserve, the two appellants were found in unlawful possession of four pieces of dried zebra meat. The meat, valued at Tshs. 2,616,000/= was the property of the United Republic of Tanzania.

In this second appeal, the appellants, are appealing against the decision of Ng'umbu—R.M., who after hearing the first appeal in the Resident Magistrate's Court of Musoma at Musoma on extended jurisdiction, dismissed the appellants' appeal against their conviction on two counts of unlawful entry into a game reserve and unlawful possession of government trophies.

The background facts are as follows. It was around 15:00 hours on 11/03/2018, Sabasaba s/o Samwel @ Simon (PW1), a game scout, was on patrol in Ikorongo/Grumeti Game Reserve. Masumbuko s/o Matandula @ Mayenga (PW3), a park ranger and game scout from Serengeti National Park, and another Zephania Elija were also in that patrol. PW1 testified that they approached two people who were under a tree shade and arrested both. Upon searching them, the scouts found four pieces of dried pieces of zebra meat. The suspects identified their names and their residence at Masinki village. According to PW1, when asked whether they had permits to be in the game reserve and possess government trophies, the two suspects did not have any. The game scouts took their suspects to Mugumu Police Station where the case was registered as case No. MUG/IR/1925/2018.

The following day, the police at Mugumu invited Wilbroad s/o Vicent (PW2), a wildlife warden based at Ikorongo/Grumeti Game Reserve, to identify and evaluate the four pieces of dried zebra meat. PW2 testified that he identified zebra meat by its colour, *"it had yellow colour and contained yellow oil."* PW2 reckoned that the two

appellants killed one zebra, which he valued at USD 1200. From the exchange rate of 1 USD to Tshs. 2180/=, PW2 valued the government trophies as totalling Tshs. 2,616,000/=. He prepared a trophy valuation certificate, which the trial court admitted as exhibit P.E.1.

G.736 Detective Corporal Egwaga (PW4) was a Police officer at Mugumu Police Station. He testified that after PW2 had identified the four pieces of zebra dried meat and prepared his trophy valuation certificate, he prepared an inventory for the perishable zebra meat (exhibit P.E.2), which he sent to a magistrate to order destruction.

After closing the prosecution's case, the trial magistrate put the appellants on their respective defences. The first appellant gave sworn evidence as DW1, totally denying that the game scouts arrested him under a tree inside the game reserve. He denied possession of government trophies. DW1 countered the prosecution's evidence insisting that he was arrested along the road at Nyakitiono village while on his way to greet his relative, Maremi Maremi. He was surprised when police at Mugumu Police station charged him with possession of four pieces of dried zebra meat. In so far as DW1 was

concerned, the prosecution witnesses fabricated the evidence against him.

In his sworn defence, the second appellant (DW2) denied the prosecution's case against him. He had on 11/03/2018 accompanied the first appellant to Nyakitiono to greet the first appellant's relative. As they were setting to return, the game scouts descended in the village and arrested them.

The learned trial magistrate (Ismael E. Ngaile—RM) was satisfied the prosecution proved its case beyond a reasonable doubt. He convicted both in the first count of unlawful entry into the game reserve, and in the second count of unlawful possession of government trophies. The trial magistrate sentenced each appellant to serve two years in prison for the first count of unlawful entry into the game reserve. He sentenced each appellant to twenty years imprisonment in the second count of unlawful possession of government trophies. The trial court ordered that the sentences of imprisonment run concurrently.

The appellants were dissatisfied and appealed to the High Court at Musoma. Hon. Warsha Ng'umbu-RM who heard the first appeal on extended jurisdiction dismissed the appellants' appeal hence this second appeal to this Court.

In their separate Memorandum of Appeal, the appellants raised four, almost identical grounds of appeal.

Firstly, they take issue with the two courts below for convicting and sentencing them without giving sufficient consideration to their respective defences.

Secondly, they blame the trial and first appellate courts for relying on exhibits which prosecution tendered irregularly.

Thirdly, the appellants fault the trial and the first appellate courts for failing to give them opportunities to call their witnesses to support their respective defences.

In their fourth ground, the appellants fault the first appellate court for creating a new section for which they were not charged with, and relying on it to convict them.

The appellants appeared in person remotely by video linked to the Musoma Prison at the appeal hearing. The learned Senior State Attorney, Mr. Valence Mayenga, appeared for the respondent Republic. Learned State Attorneys Mr. Yese Temba and Mr. Roosebert Nimrod Byamungu assisted Mr. Mayenga. The two appellants adopted their memoranda of appeal and preferred to let the learned Senior State Attorney address first on their grounds of appeal.

Mr. Yese Temba learned State Attorney submitted on behalf of his colleagues. Before addressing the appellants' grounds of appeal, the learned State Attorney urged us to deliberate a ground that can nullify the entire decision of the first appellate court. He elaborated that the first appellate court did not address the appellants' grounds in their petition of appeal. Mr. Temba submitted that the failure to consider the grounds in the petition implies that there is no judgment before this Court, from the first appellate court. He urged us to invoke our power of revision under section 4(2) of the Appellate Jurisdiction Act Cap. 141 R.E. 2019 (the AJA) to strike out the first appellate court's judgment. He reminded us that we took a similar position in our earlier

decision in **SIMON EDSON @ MAKUNDI V. R**, CRIMINAL APPEAL NO. 5 OF 2017 [TANZLII].

The main question is whether Mr. Temba is correct that the first appellate court ignored the appellants' grounds of appeal which they presented in their Petition of Appeal. The record bears out that the appellants appealed against the judgment and decision of the trial court. The appellants raised four grounds in their Petition of Appeal, which we paraphrase: (1) the trial magistrate failed to give sufficient consideration to the defence evidence; (2) the trial court relied on wrong exhibits which the prosecution presented, which did not prove the offences; (3) the trial court neither notified nor allowed the appellants to call their witnesses; and (4) the trial court did not afford the appellants a chance to call in their witnesses.

Mr. Temba is correct, the first appellate court, did not address the appellants' grounds which they had raised in their appeal petition. The much Ng'umbu, RM (Ext. Jur.) could do was to consolidate what he described as replica petitions of appeal for: *"...convenience and saving of time and other associated resources."* After saying so much, he prepared two issues for his determination:

"(1) whether the prosecution's case was proved to warrant the conviction of the appellants of the offences; and (2) whether the sentences imposed upon the appellants on each offence of which he was found guilty were legal and nor its extent justified."

With regard to the defence evidence, he stated:

"On his defence the 1st appellant (DW1) asserted to had been arrested on 11/03/2018 at 16:30 by the Game scouts at Nyakitono Village on a way to his relative and denied to had been found in possession of the alleged zebra meat. On the other hand the second appellant (DW2) stated that he was arrested on 12/03/2018 while on the way in company of the 1st appellant from the first appellant's relative."

Ng'umbu, RM (Ext. Jur.) then reached his conclusion:

"It is therefore clear from the testimonies of PW1...and PW2..., PW3... and PW4 and the exhibits PE1, PE2 that the prosecution proved the case on all of the offences on all counts beyond reasonable doubts as the contradictory defences as on the date of their arrest did not cast a reasonable doubt. The conviction of the offences were justified."

We agree with Mr. Temba that the impugned judgment of the first appellate court suffers from irreparable irregularity of failing to consider the appellants' grounds of appeal, and has also denied the appellants their fundamental right to a fair hearing. As a result, we invoke our power of revision under section 4 (2) of the AJA to quash and set aside all the proceedings in the Resident Magistrate's Court of Musoma (Extended Jurisdiction IN Criminal Appeal No. 27 of 2019), together with the Judgment of W. Ngúmbu-RM (EJ) delivered on 17/10/2019.

Having exercised our power of revision and quashed the proceedings and the decision of the first appellate court, we remain with the question of the fate of the appellants' first appeal. When sitting on a first appeal, the first appellate court invariably takes a fresh look at the totality of the evidence before arriving at its findings and conclusions. The first appellate court must, however, bear in mind that the trial court had a vantage position to hear and see the witnesses: (See, **SIZA PATRICE V. R.**, CRIMINAL APPEAL NO. 19 OF 2010 and **MWITA SANGALI V. R.**, CRIMINAL APPEAL NO. 266 OF 2011 (both unreported).

Mr. Temba, State Attorney, supported the appeal and urged us to set the appellants free. In helping us take a fresh look at the evidence before the trial court, the learned State Attorney referred us to the appellants' first ground of appeal. They complained that the trial court did not consider the defence evidence. Expressly, he referred us to page 52 of the record of appeal where Ismael E. Ngaile, the trial Resident Magistrate, merely stated that he gave the accused the opportunity to defend before he proceeded to rely and act on the evidence of the four prosecution witnesses (PW1, PW2, PW3, and PW4). Mr. Temba effectively conceded that the trial court failed to consider the appellants' evidence as well.

The learned State Attorney urged us to discount the evidence of an inventory (Exhibit P.E. 2). This exhibit appearing on page 48 of the record of appeal, shows the order of the Resident Magistrate at Serengeti, allowing a police officer (PW4 DC Egwaga) to destroy four pieces of dried wildebeest meat and four pieces of dried zebra meat, which are perishable. He submitted that the appellants should have been present when the Resident Magistrate issued the order.

When we invited them to submit, the two appellants could not but agree with Mr. Temba. They urged us to allow their appeal and order their release from prison. Mr. Yese Temba urged us to expunge exhibit PE2. We agree. As we said in **MOHAMED JUMA @MPAKAMA V. R.,** CRIMINAL APPEAL NO 385 OF 2017 (TANZLII) emphasizes the mandatory right of accused persons to not only be present before the Magistrate but also be heard before the Magistrate issues any order for destruction of perishable government trophies. In our present appeal, the need for the presence of the appellants becomes more poignant because, while the second count charges the appellants with illegal possession of four pieces of dried zebra meats, the inventory (exhibit PE2) includes four pieces of dried wildebeest meat. The prosecution denied the appellants the opportunity to question the belated addition of the dried wildebeest meat.

Our next task is to determine whether the trial district court of Serengeti considered the defence evidence. It will be relevant for us to examine the salient ingredients of unlawful entry into the game reserve and illegal possession of government trophies, for which the trial court convicted the appellants. Each of the two counts of unlawful

entry into the Game Reserve, and unlawful possession of government trophies, have distinct essential elements that need proof beyond a reasonable doubt. As this Court stated in **ANDREW LONJINE V. R.,** CRIMINAL APPEAL NO 50 OF 2019 (TANZLII), proof beyond reasonable doubt implies in our present appeal, proving all the essential elements constituting the offences of unlawful entry into the game reserve and illegal possession of government trophies.

Section 15(1) of the WCA creates the offence of unlawful entry in the following way:

> *"15.-(1) Any person other than a person traveling 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."*

The particulars of the first count alleged that the game scouts found the appellants at Mto Rubanda area into Ikorongo Game Reserve. The game scouts, PW1 and PW3, testified that they saw the two appellants under a tree shade at the Mto Rubanda area within Ikorongo Game Reserve. The first appellant (DW1) denied that the game scouts arrested him inside the game reserve. He insisted that he

was on his way to meet his relative Maremi when they stopped him along the road and took him to Mugumu Police Station. The second appellant (DW2) testified that he was with the first appellant when the game scouts arrested them. After receiving competing evidence on whether the scouts arrested the appellants inside or outside the boundaries of Ikorongo Game Reserve, one would have expected the trial court to weigh and evaluate the competing evidence.

We have looked into the judgment of the trial court. After considering the evidence of each prosecution witness, the learned trial magistrate did not consider the defence evidence; he merely stated: *"The accused person was given an opportunity to defend the case against them and in their defence, they testified to the court that they were arrested on the 11th March 2018 at Nyakitono village while they were on the way going to great their relative named Moremi."* Without even addressing whether Nyakitono village, where the game scouts arrested the appellants, is within the Ikorongo Game Reserve. The trial magistrate went on to believe, rely and act on the evidence of prosecution witnesses:-

"From the evidence of both prosecution and defence side, it is very abundantly clear that the evidence of PW1, PW2, PW3, and PW4 are very corroborative and creates no any doubt and thus answers the above-framed issues in an affirmative manner. This court does not conclude basing only on the weaknesses of the defence but rather, the strength of the prosecution evidence. On the basis of the aforesaid reasons, I do find that the prosecution successfully proved the case against the accused persons beyond reasonable doubt as required by the law in respect of both offences charged, and I consequently find the accused persons herein. ...To be guilty of an offence termed; 1st count: unlawful entry into the game reserve... ...and 2nd Count: unlawful possession of Government trophies..."

The learned trial magistrate neither considered nor evaluated the defence evidence before concluding that the prosecution's evidence proved both counts of unlawful entry into the game reserve and unlawful possession of government trophies.

The First Schedule to the Wildlife Conservation (Ikorongo and Grumeti Game Reserves) (Declaration) Order, G.N. No. 214 of 1994, mark out the boundaries of the Ikorongo Game Reserve. For an

offence of illegal entry to stand, the evidence must prove that the game scouts arrested the appellants strictly within the statutory boundaries of this game reserve. It will not suffice, for the prosecution witnesses, to merely allege that the scouts stopped the appellants *"at Mto Rubanda area into Ikorongo Game Reserve."* The trial court must evaluate competing evidence and be satisfied that the "Mto Rubanda area" is within the Ikorongo Game Reserve.

This Court has always taken a grave view of the failure to consider the accused person's defence and regards it as making a resulting conviction unsafe. In **ALLY PATRICK SANGA V. R,** CRIMINAL APPEAL NO. 341 OF 2017 [TANZLII], we reiterated the duty of courts to objectively evaluate defence evidence; failure of that makes conviction unsafe:

> *"We think that in a first appeal, the first appellate court was supposed to objectively evaluate the gist and value the defence evidence, and weigh it against the prosecution case. Failure to re-evaluate evidence of the defence constituted an error of law and by affirming a conviction based on evidence*

which had not been duly reviewed was also another error which renders the conviction unsafe."

In the upshot, we agree with both the appellants and Mr. Temba that the appeal has merit, and we allow it. We accordingly quash the appellants' convictions and the sentences and set them aside. The appellants are to be released immediately from prison unless they are otherwise lawfully held.

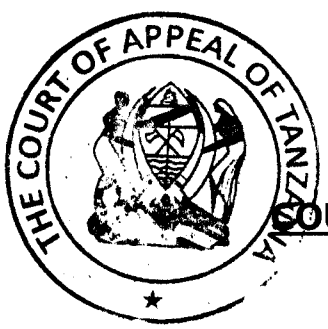
DATED at **MUSOMA** this 21st day of October, 2021.

I. H. JUMA
CHIEF JUSTICE

F. L. K. WAMBALI
JUSTICE OF APPEAL

L. L. MASHAKA
JUSTICE OF APPEAL

The Judgment delivered this 22nd day of October, 2021 in the Presence of Mr. Yese Temba, learned State Attorney for the Respondent/Republic and the Appellants 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