IN THE COURT OF APPEAL OF TANZANIA

AT MUSOMA

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

CRIMINAL APPEAL NO. 510 OF 2019

CHEYONGA SAMSON @ NYAMBARE ....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. 26 of 2019

JUDGMENT OF THE COURT

22nd & 25th October, 2021

JUMA, C.J.:

CHEYONGA S/O SAMSON @ NYAMBARE, the appellant, appeared before the District Court of Serengeti at Mugumu, charged with the following three counts. The first count charged the appellant with unlawful entry into the game reserve contrary to section 15(1) and (2) of the Wildlife Conservation Act No. 5 of 2009 (the WCA). The particulars alleged that on 16/06/2018, the appellant entered into the Ikorongo/Grumeti Game Reserve at Sirisiriba area without prior permission of the Director of Wildlife.

The second count which the appellant faced related to unlawful possession of weapons in the game reserve. This offended section 17(1) and (2) of the WCA read together with paragraph 14 of the First Schedule of the Economic and Organized Crime Control Act Cap. 200 R.E. 2002 (the EOCCA) as amended by the Written Laws (Miscellaneous Amendments) No. 3 of 2016. The particulars of this count were that the appellant possessed a weapon, a machete, at Sirisiriba area in the Ikorongo/Grumet Game Reserve without a permit, and he failed to satisfy an authorized officer that the machete was not for hunting or killing, wounding, or capturing of wild animals.

The third count the appellant faced related to unlawful possession of government trophies in the form of eight pieces of dried wildebeest meat. This offended section 86(1) and (2) (c) (iii) of the WCA read together with paragraph 14 of the First Schedule to of the EOCCA as amended by the Written Laws (Miscellaneous Amendments) No. 3 of 2016.

The prosecution built its case on the testimonies of four witnesses. These were, the two Game Scouts from Ikorongo/Grumeti game reserve, Mwikwabe Joseph @ Kichambati (PW1) and Gideon Timani (PW2); a wildlife warden,

Wilbroad Vicent (PW3); and a police officer at Mugumu in Serengeti District, WP 5665 detective constable Sijali (PW4).

The appellant's encounter with the law enforcement officers began on 16/06/2018 at around 08:40 am. While on patrol along an area PW1 described as Risiriba, PW1 and PW2 saw a person walking and carrying a luggage on his head, and they accosted him. That person introduced himself to the scouts as CHEYONGA S/O SAMSON @ NYAMBARE (the appellant). The scouts arrested him, and upon searching his luggage, they found eight dried pieces of wildebeest meat and a machete. After establishing that Cheyonga did not have a permit to enter and possess government trophies and weapons in reserve, they transported him to Mugumu Police Station. Thereafter, the police registered the case as Number MUG/IR/2059/2018.

The following morning, PW4 received an assignment to investigate the case. After labelling the exhibits (a machete and eight pieces of dried wildebeest meat), PW4 invited PW3, a wildlife warden, to identify and also determine the value of the impounded government trophies. PW3 duly identified the eight dried pieces of wildebeest meat by their colour, which he

described as "slightly grey to darker brown, with white oil." He evaluated eight pieces of meat to be equivalent to one killed wildebeest. He placed the value of a wildebeest at 650 USD at the exchange rate of 1 USD to Tshs. 2180, the total value of the wildebeest killed was Tshs. 1,417,000/=. The appellant did not object when PW3 offered to tender the government trophy valuation certificate (exhibit PE. 2). On 18/06/2018, PW4 prepared an inventory form to take to a magistrate to obtain an order for the disposal of the perishable pieces (eight) of dried wildebeest meat.

The appellant testified in his defence. He explained at around 6 am on the day of his arrest, he had gone to his area within Mbilikili village to cut building poles. The site was near the Ikorongo Game Reserve. Around 9 am, game scouts from Ikorongo Game Reserve came by where he was. They assaulted him, asking whether he had seen cattle grazing within the game reserve pass by. The scouts first took him to their camp before taking him to Mugumu Police Station. He denied the scouts' claim that he was carrying luggage when they arrested him at Risimbe river. He was on his farm fetching building materials (poles), he insisted.

The trial learned trial magistrate, Hon. Ismael Ngaile—RM, found the appellant guilty and convicted him on all three counts. In the first count of unlawful entry into the game reserve, he sentenced the appellant to serve one year in prison. The trial magistrate ordered him to serve two years in prison for the second count of unlawful possession of weapon, and twenty years for the third count of unlawful possession of government trophy. These sentences ran concurrently.

The appellant was dissatisfied with his conviction and appealed to the High Court at Musoma. Hon. J.R. Kahyoza (Judge in-Charge) transferred the appeal to the Resident Magistrate's Court of Musoma under Section 45(2) of the Magistrates Courts Act, Cap. 11 and directed W.S. Ng'umbu-RM to hear that first appeal on extended jurisdiction (EJ).

Hon. W.S. Ng'umbu-RM (EJ) dismissed the appeal, holding that the prosecution had proved the case on all counts beyond a reasonable doubt, and the defence did not cast any doubt against the prosecution's case.

Being dissatisfied with the dismissal of his first appeal, the appellant filed his memorandum of appeal containing five grounds of appeal, which we paraphrase as follows.

Firstly, the two courts below did not consider his defence and relied on prosecution evidence to convict him.

Secondly, the two courts below grossly misdirected themselves in relying solely on the evidence of game ranger and game scouts without any support of independent evidence.

Thirdly, the trial and first appellate courts were wrong to rely on the exhibits the game scouts created purposely to convict him.

Fourthly, the courts below failed to allow the appellant to call his witness to support his defence.

Fifthly, the first appellate court failed to evaluate the appellant's grounds of appeal.

At the hearing of this second appeal, the appellant appeared in person by video link to Musoma Prison in Musoma. The 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 appellant adopted his five grounds of appeal and reserved his submissions till after hearing from the learned State Attorneys.

On behalf of his colleagues, Mr. Roosebert Byamungu began his submissions by faulting the judgment of the Court of Resident Magistrate of Musoma with Extended Jurisdiction, which sat as the first appellate court. He elaborated that Hon. Ng'umbu, RM (EJ) failed to consider the five grounds of appeal that the appellant raised through his appeal petition. Like the trial District Court before him, the learned first appellate Resident Magistrate (EJ) also raised issues for his determination and then made generalized statements that the prosecution had proved its case beyond reasonable doubt.

In so far as Mr. Byamungu is concerned, the first appellate court had no business raising issues like trial courts, he should rather have addressed the petition grounds. Therefore, he urged us, the judgment of the first appellate court was not a judgment in the eyes of the law. He asked us to invoke our power of revision under section 4(2) of the Appellate Jurisdiction Act, Cap 141 R.E. 2019 (the AJA), to nullify the decision of the first appellate court. He submitted that we took similar measures in **SIMON EDSON @ MAKUNDI V. R**, CRIMINAL APPEAL NO. 5 OF 2017 [TANZLII].

With our nullification of the judgment of the Resident Magistrate's Court of Musoma exercising extended powers, Mr. Byamungu submitted, the Court

cannot consider the appellant's grounds of appeal because they emanate from a judgment that no longer exists on record. He suggested two possible alternative ways forward. The first possible way is for the Court to order the return of the record of this appeal to the Resident Magistrate's Court of Musoma for that subordinate Court to hear the appellant's grounds of appeal on extended jurisdiction. The second option is for us to assume the role of the first appellate Court, to re-evaluate the evidence available in the trial court's record. According to Mr. Byamungu, returning the record to the Resident Magistrate's Court will entail much delay. He prompted us to adopt the second option of stepping into the shoes of the first appellate court to re-evaluate the evidence on record. He considers this approach as more in keeping with the best interests of justice.

The learned State Attorney next took us through the evidence of both the prosecution and the defence regarding the third count of unlawful possession of government trophies (eight pieces of dried wildebeest meat).

In order to prove this third count, he explained, the prosecution, through PW4, tendered an inventory (exhibit P.E.3), showing how on 18/06/2018, a magistrate allowed the disposal of the perishable pieces of dried wildebeest

meat. Mr. Byamungu gave reasons why he thought exhibit P.E. 3 could not suffice to convict the appellant in the third count of unlawful possession of government trophies. First, because exhibit P.E.3 does not show that the magistrate gave the accused person (the appellant) the opportunity to be present before he ordered the disposal of the dried wildebeest meat. Secondly, the magistrate did not hear the appellant's version of how the eight pieces of dried wildebeest meat were found in his possession. The learned State Attorney cited the case of **MOHAMED JUMA**

@MPAKAMA V. R., CRIMINAL APPEAL NO 385 OF 2017 (TANZLII), where this Court gave helpful guidance emphasizing the right of an accused person to be present before a magistrate issues an order to dispose of the perishable exhibit, together with the accused person's right to be heard. All said, Mr. Byamungu urged us to allow the appellant's appeal concerning the third count of unlawful possession of government trophies.

Mr. Byamungu did not however relent on first count of unlawful entry into the Ikorongo/Grumet Game Reserve, and on the second count of unlawful possession of weapons in the Ikorongo/Grumet Game Reserve. Based on his view of the evidence on record, he demonstrated why he believes that our re-

evaluation of evidence will still convict the appellant on the first and on the second counts.

In support of his proposition that we should convict the appellant on the two counts, Mr. Byamungu urged that the game scouts (PW1 and PW2) who arrested the appellant gave direct evidence under section 62(1) of the Evidence Act, Cap 6 R.E. 2019. They asserted that they stopped the appellant at Sirisiriba within Ikorongo Game Reserve. The learned State Attorney was however, not forthcoming when we prodded him whether the area of arrest was within the statutory limits of the Ikorongo Game Reserve.
He urged us to believe the prosecution evidence that placed the appellant within the Ikorongo Game Reserve carrying a machete.

Mr. Byamungu moved on to the sentencing provisions. He referred to the sentences of one year imprisonment, which the trial court imposed for the first count of unlawful entry into the game reserve, and the two years in prison for the second count of illegal possession of a weapon in the game reserve. He asked us to enhance the sentences to comply with the minimum sentences of twenty years because on 16/06/2018 when the appellant committed these two offences, the EOCCA had already been amended by the Written Laws

(Miscellaneous Amendments) Act, 2016 [Act No. 3 of 2016] to prescribe a minimum sentence of twenty years for unlawful entry into the game reserve, and for unlawful possession of a weapon in the game reserve. He cited the case of **NG'WAJA JOSEPH SERENGETA @ MATAKO MEUPE V. R.,** CRIMINAL APPEAL NO. 417 OF 2018 [TANZLII] where the Court stated that following the amendment of the EOCCA by Act No. 3 of 2016, the law now requires a person convicted of corruption or economic offence, to serve prison term for not less than twenty years but not exceeding thirty years.

In his submissions earlier, Mr. Byamungu invited us to nullify the judgment of the Resident Magistrate's Court of Musoma (EJ) because the first appellate court did not consider the appellant's grounds in the appeal petition. We agree with the learned State Attorney that the failure by the first appellate court to consider the grounds of appeal which the appellant presented through his petition of appeal was a fatal irregularity calling for the exercise of our power of revision under section 4(2) of the AJA. The first appellate court failed to heed what we directed appellate courts in **MALMO MONTAGEKONSULT AB TANZANIA BRANCH V. MARGRET GAMA,** CIVIL APPEAL NO. 86 OF 2001 (unreported) that:

"... 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 ground of appeal only or discuss each ground separately".

Given the failure of the first appellate court to consider the grounds of appeal petition, we invoke our revisional powers under section 4(2) of the AJA to nullify and quash the judgment of the Resident Magistrate's Court of Musoma (EJ) in Criminal Appeal No. 26 of 2019.

After nullifying the judgment of the first appellate court, we shall take the role of the first appellate court. Because Mr. Byamungu conceded the appeal against the third count of unlawful possession of Government trophies, we shall re-evaluate the evidence relating to the remaining first and second counts of unlawful entry into the game reserve and unlawful possession of a weapon in the game reserve. Whether we should agree with the learned State Attorney to enhance the sentences on conviction in the first and second counts will depend on the outcome of our re-evaluation of evidence.

We now have to re-evaluate the competing evidence, whether the appellant entered the Ikorongo Game Reserve, specifically, whether the appellant is the person PW1 claims he saw at Risiriba within Ikorongo Game Reserve, "carrying a luggage" which upon search contained eight pieces of dried wildebeest meat. Particulars of the offence in the first and second counts allege that the game scouts arrested the appellant at the Sirisiriba area of Ikorongo/Grumeti Game Reserve. PW1 testified that he and other game scouts, who included PW2 arrested the appellant within Ikorongo/Grumeti reserve. PW2 testified that they stopped the appellant at RUSIRI inside that game reserve.

The appellant defended himself that the game scouts arrested him at MBILIKILI Village while harvesting building poles outside the Ikorongo/Grumeti Game Reserve.

After receiving conflicting versions of evidence on where the game scouts arrested the appellant, we expected the trial magistrate to consider and weigh the competing evidence before concluding that the prosecution evidence outweighed the appellant's evidence. The particulars of the offence in the first and second counts mention "Sirisiriba area into Ikorongo/Grumeti." PW1

mentions "Risiriba within Ikorongo Game Reserve." PW2 identifies the "Rusiri area." The specific area where the game scouts arrested the appellant is an essential ingredient *(actus reus)* of both unlawful entry into the game reserve and the offence of unlawful possession of weapon in the game reserve.

The prosecution did not cross-examine the appellant on his testimony that the game scouts accosted and arrested him at his village outside the Ikorongo Game Reserve. Cross-examination would at least have shown that

the prosecution did not accept the appellant's version as accurate. Failure to cross-examine suggests that the prosecution did not dispute the appellant's version of evidence that the game scouts stopped and arrested him at his farm which was outside the Ikorongo Game Reserve.

We disagree with Mr. Byamungu that we should give the evidence of the game scouts (PW1 and PW2) more credence than the appellant. We shall stick by the position this Court took in **GOODLUCK KYANDO V. R.** [2006] TLR 363, 367 that, "*every witness is entitled to credence and must be believed, and his testimony accepted unless there are good and cogent reasons for not believing a witness.*" The learned State Attorney did not show us any convincing why reason we should not believe the appellant.

Since the Ikorongo Game Reserve boundaries are statutorily defined, the evidence on record must place the appellant inside the statutory limits of this reserve. It will not suffice to shift the evidential burden to the accused person where PW1 and PW2, the two prosecution witnesses, merely narrate that the game scouts arrested the appellant inside the Ikorongo Game Reserve without demonstrating the area of the arrest of the appellant to be within the statutory boundaries of that reserve. At very least, Mr. Byamungu conceded that the First Schedule of the Wildlife Conservation (Ikorongo and Grumeti Game Reserves) (Declaration) Order, 1993 (GN NO. 214 of 1994) provides the boundaries of the Ikorongo Game Reserve.

We disagree with the trial magistrate's evaluation of evidence, which concluded that the evidence of PW1 and PW2 proved that the game scouts arrested the appellant within the Ikorongo Game Reserve in unlawful possession of a machete.

After finding that the prosecution evidence did not prove beyond reasonable doubt that the game scouts arrested the appellant inside the Ikorongo Game Reserve, we shall not bother ourselves with the question of whether the appellant wielded a machete when the scouts stopped to arrest

him. Also, we shall not address Mr. Byamungu's urging to enhance the sentences to the minimum of twenty years.

In the upshot, we allow this appeal, quash the appellant's conviction by the trial court, and set aside the sentences. The appellant shall be set at liberty immediately unless he is otherwise lawfully held.

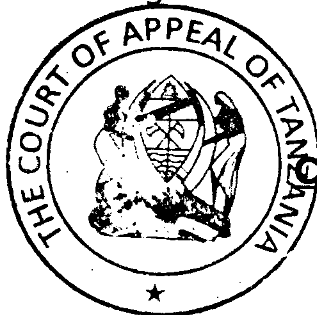
DATED at **MUSOMA** this 23rd day of October, 2021.

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