IN THE COURT OF APPEAL OF TANZANIA

AT TABORA

(CORAM: MWARIJA, J.A., MWANDAMBO, J.A., And MASHAKA, J.A.)

CRIMINAL APPEAL NO. 48 OF 2018

1.	NGIKA IGEMBE	..... APPELLANTS
2.	DAUD MAHONA @ NGH'OGA	
3.	TARIME CHEREHANI	

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Tabora)

(Mallaba, J.)

dated the 4th day of January, 2018
in
(DC) Criminal Appeal No. 126 c/f 129 & 131 of 2017

JUDGMENT OF THE COURT

14th & 22nd March., 2022

MWARIJA, J.A.:

This appeal arises from the decision of the High Court of Tanzania sitting at Tabora in consolidated (DC) Criminal Appeals Nos. 126, 129 and 131 of 2017. The first two appeals, Criminal Appeals No. 126 and 129 of 2017 were preferred by the appellants while the third appeal,

Criminal Appeal No. 131 of 2017 was an appeal by the respondent Republic.

The three appeals to the High Court arose from the decision of the Resident Magistrate's Court of Tabora in Criminal Case No. 143 of 2017. In that case, the appellants were charged with three counts of unlawfully grazing cattle in a game reserve contrary to s. 18 (2) of the Wildlife Conservation Act, No. 5 of 2009 (the WCA). In the 1st count, it was alleged that on 15/6/2017 at night time, being the owners of a herd of livestock consisting of 256 cattle, the appellants unlawfully grazed that herd of cattle in Sagara area within Moyowosi Game Reserve (the game reserve) situated in Kaliua District within Tabora Region. In the 2nd and 3rd counts, it was alleged that the appellants unlawfully grazed their other herds of cattle comprising of 769 and 77 cattle in Mweha and Magongoro areas respectively within the game reserve.

The appellants denied all counts and as a result, the case proceeded to a full trial. Having heard three witnesses for the prosecution and four defence witnesses including the appellants, the trial court found that all counts had been proved against the appellants. Upon their conviction, they were each sentenced to pay a fine of TZS.300,000.00 or two years imprisonment in default. With regard to

the cattle which were under the custody of the authority of the game reserve, the trial Court declined the prosecution's prayer for a forfeiture order under S. 111 (1) of the WCA and ordered that the same be returned to their owners subject to payment of sustenance costs thereof within one month of the date of delivery of the judgment.

Whereas the appellants were aggrieved by the conviction and sentence as well as the payment of sustenance costs, the respondent Republic was dissatisfied with the trial court's refusal to forfeit the cattle hence the three appeals to the High Court as described above.

Having heard the consolidated appeals, the High Court (Mallaba, J.) upheld the appellants' convictions and except for the order quashing the order for payment of sustenance costs, he dismissed their appeal. As for the respondent's appeal, the learned first appellate Judge found that, after the appellants' conviction, the trial court ought to have ordered forfeiture of the cattle because under S. 111 (1) of the WCA, that is a mandatory consequential order. Aggrieved further by the decision of the High Court, the appellants preferred this second appeal raising a total of seven grounds of their complaint.

Before we proceed to consider the grounds of appeal, it is apposite at this stage, to state the background facts giving rise to the appeal.

The appellants were until the material time, the residents of Igagala Village which boarders the game reserve. They were engaged in pastoralism, each one of them owning a reasonably huge number of cattle. On 15/6/2017, the 1st appellant's herd of livestock consisting of 256 cattle were seized by the officials of the game reserve on account of having been found grazing within the game reserve at Sagara area. The other herds consisting of 769 and 77 which belonged to the 2nd and 3rd appellants respectively were seized by the same officials for having allegedly been found grazing in Mweha and Magongoro areas respectively, also within the game reserve.

After the seizure, the herds of cattle were kept together at Magongoro area in Igagala Village No. 5 and later on, arrangements were made to auction them on account that they were stray cattle. Before the scheduled date of the intended auction however, the process was stopped after the appellants had filed an application in the High Court, Misc. Civil Application No. 53 of 2017 (the application) seeking a declaration that the cattle belonged to them. The action taken by the appellants of filing the application, apparently triggered initiation by the authority of the game reserve, of the process leading to the filing of the charges against the appellants.

In the trial court, the prosecution relied on the evidence of three witnesses, Charles Nyamhanga (PW1) who was at the material time in the game reserve's anti-poaching unit, Aloyce Kenyata Mpinge (PW2) who was an official of the Ministry of Wildlife and Tourism, Geographically Information System (GIS) department at Morogoro and Patrick Kutondolana (PW3) who was at the material time the Manager of Moyowosi–Kigosi Game Reserves. The substance of their evidence is as follows:

According to PW1, on 15/6/2017 at 8:20 hrs while on the routine patrol in the game reserve with other 18 Anti-poaching officers (the wildlife rangers) who were under his supervision, found a herd of cattle grazing at Sagara area within the game reserve. The herd had 256 cattle and no one was found looking after them. He assigned some of the wildlife rangers to look after those cattle and continued with the patrol. At Mweha area, he found another herd consisting of 769 cattle again without a herder. He decided to drive that second herd of cattle to Sagara to join them with the first herd. It was his evidence further that, on 20/6/2017 at 12:00 hrs while on patrol, he found another herd of cattle grazing at Magongoro area also within the game reserve. According to him, the herd had 77 cattle and like for the other two herds

of cattle, there was no one looking after them. He tendered the cattle, the number of which had multiplied to 1126 as exhibits and the same were admitted as exhibit P1 collectively.

With regard to PW3, his evidence was that, after being informed about incident, he prepared the coordinates of the three areas at where each of the three herds of cattle were allegedly found. He testified that on 15/6/2017 at about 19:30 hrs, he was informed about the finding of the first herd of cattle at Sagara. On 16/6/2017 he went to the area and prepared the coordinates and while with the patrol team at Mweha area, he saw another herd consisting of 769 cattle. Again, he prepared the coordinates and ordered that the cattle be driven to Sagara area where the first herd was being kept. From Mweha, he travelled to Kahama and on 20/6/2017, he went to Kaliua Police Station to seek their assistance. He left with six policemen and while at Magongoro area within the game reserve, he found another herd of livestock consisting of 77 cattle. He again took the coordinates. Later on 21/6/2017, he went to Kahama to send the coordinates of the three areas to the headquarters at Morogoro. He described the distances from the points of entry to the area where the three herds of cattle were found; Sagara, Mweha and Magongoro to be 19 Kms, 34 Kms and 9 Kms respectively. He testified

further that, since the three herds of cattle were found without any person looking after them, his office decided to auction them on 16/8/2017. The auction did not however, take place after the appellants had filed the application.

As for PW2, his evidence was to the effect that, on 21/6/2017 after being provided with the coordinates, he drew a map showing their locations and another map showing three areas in the game reserve were the herds of cattle were allegedly found. He sought to tender the two maps and despite an objection by the appellants' counsel on the grounds that the drawer thereof and the date on which the maps were drawn are not shown, the same were admitted in evidence.

In their defence, the appellants denied the allegation that they had unlawfully grazed their cattle in the game reserve. They contended that the cattle were grazing within the boundaries of the appellants' villages but the wildlife rangers purposely drove them into the game reserve.

According to DW1, on 15/6/2017 at about 17:00 hrs while taking his cattle to their enclosure (boma) he heard some noise and saw a number of the cattle herders running towards him. Shortly thereafter, he saw certain wildlife rangers driving his cattle into the game reserve. He was afraid of approaching the wildlife rangers because they had

guns. He could not also follow them as he did not have a permit to enter into the game reserve. He went on to state that, he unsuccessfully made a follow up with the relevant authorities and on the advice of PW3, travelled to Tabora for a further follow up with the authorities on his cattle. While at Tabora, he met the 2nd and 3rd appellants. He later approached his advocate, Mr. Musa Kassim who wrote a letter to the anti poaching unit complaining that his cattle were unlawfully seized. He finally filed the application jointly with the 2nd and 3rd appellants claiming for return of their cattle, the effect of which they ended up being charged as shown above.

On his part, DW2 testified that on 16/6/2017, his cattle herder reported to him that the cattle which were grazing at Ufulaga area had been taken by the wildlife rangers. Having also unsuccessfully made a follow-up with the game reserve authorities through his cattle herder on 20/6/2017, he decided to travel to Tabora where he found the 1st and 3rd appellants pursuing the same matter and joined them in filing the application.

The evidence of DW3 was similar to that of DW1 and DW2. He testified that on 16/6/2017 while looking after his cattle at Ufulaga area with other cattle herders, he saw a group of armed persons charging

towards the area where the cattle were grazing. He decided to run away together with his colleagues. Those persons who turned out to be the game reserve's wildlife rangers, drove his cattle into the game reserve. On the next day, he went to the place where the cattle were kept. He was arrested by the wildlife rangers and detained until the next day when he was released. His claim that the cattle belonged to him was refused. He later decided to travel to Tabora and jointly with the 1st and 2nd appellants filed the application. As a result of the application he said, he was charged as shown above.

The appellants called one witness to support their story, Hussein James Tungu (DW4). He testified that on 15/6/2017 at about 17:00 hrs while in his farm at Igagala Isante Village, he heard some noise and shortly thereafter, he saw a motor vehicle. It stopped and about five wildlife rangers who were armed with guns disembarked. The son of the 1st appellant who was taking his father's cattle into the boma had to run away. He saw the wildlife rangers going straight to the cattle and started to drive them away.

Having considered the tendered evidence, the learned trial Resident Magistrate found that the prosecution evidence had proved the charges against the appellants beyond reasonable doubt. He was of the

view that the evidence of PW1 that he found the cattle at the three stated areas was supported by the testimony of PW3 who prepared the coordinates showing that those areas were in the game reserve as confirmed by the tendered maps (exhibit P2) drawn by PW2. The learned trial Resident Magistrate relied also on the cattle that was tendered as exhibit P1. On the appellants' defence, he was of the view that the same did not raise any reasonable doubt in the prosecution case.

On appeal to the High Court, although he discredited the evidence of PW2 on account that he was not at the scene when he drew the maps but did so relying on the coordinates sent to him by PW3, the learned High Court Judge believed the evidence of PW1 and PW3 that the herds of cattle were found in the game reserve. He was of the view that, whereas PW1 and PW3 were well versed with the boundaries of the game reserve, the appellants were not in the position to know such boundaries, the fact which he found to have been admitted by them in their evidence.

The learned first appellate Judge found further that, although the evidence of DW4 was not evaluated by the trial court, it was his view that having re-evaluated the same, that defence did not raise any

reasonable doubt in the prosecution case. According to the learned Judge, this is because in his evidence, DW4 said that he saw the 1st appellant's son, James Mahona looking after his father's cattle at about 17:00 hrs while the wildlife rangers who seized the cattle, the subject matter of the charge, arrived there between 19:30 and 20:00 hrs. The High Court found therefore that, the trial court was correct in its finding that the prosecution had proved the charges against the appellants beyond reasonable doubt. The appellants' appeal against conviction was therefore dismissed.

Nevertheless, the first appellate Judge found that the learned trial Resident Magistrate erred, first, in ordering the appellants to pay sustenance costs and secondly, by refusing to forfeit the cattle. In the circumstances, as shown above, the learned first appellate Judge proceeded to set aside the orders of sustenance costs and restitution of the cattle and with regard to the cattle, he ordered that the same be forfeited to the Government.

As pointed out above, the appellants were aggrieved by the decision of the High Court and thus brought this appeal. In their memorandum of appeal filed on 8/3/2018, they have raised five grounds as follows:

"1. *That the 1st appellate court erred in law by failing to consider that, inadmissibility of the sketch map (Exh. P2) alleged to indicate the coordinates where the herds of cattle were seized, vitiated the entire prosecution case.*

2. *That, the 1st appellate court erred in law by failing to evaluate the chain of custody and validity of the coordinates taken by PW3.*

3. *That, the 1st appellate court erred in law by confirming the trial court's decision which failed to consider the defence case leading to unfair trial.*

4. *That, in re-evaluating the evidence adduced by the prosecution, [the 1st appellate court] failed to note a critical fact that, PW1 conceded to be not certain with areas where the herds of cattle were seized.*

5. *That, the 1st appellate court erred in law in upholding the trial court's conviction which emanated from the case not* proved beyond any reasonable doubt."

Later on 11/5/2018, the appellants filed a supplementary memorandum of appeal which consists of the following two grounds:

"1. That the Honourable trial Magistrate and the High Court Judge erred in law and fact by seriously misapprehended the substance, nature and quality of evidence in the proceedings and thus resulting in unfair conviction and sentence.

2. That the Honourable High Court Judge erred in law to order forfeiture of the livestock in addition to the sentence passed."

At the hearing of the appeal, the appellants were represented by Mr. Godwin Ngwilimi assisted by Mr. Gervas Geneya, learned advocates while the respondent Republic was represented by Ms. Juliana Moka, learned Principal State Attorney.

Before the commencement of hearing, Ms. Moka, expressed the respondent's stance on the appeal, that she was supporting it, mainly on the basis of the 1st ground in the supplementary memorandum of appeal. Following the stance taken by the respondent, Mr. Ngwilimi based his arguments on that ground of appeal together with ground 5 in the memorandum of appeal only. He abandoned grounds 2, 3 and 4 in the memorandum of appeal and ground 2 in the supplementary memorandum of appeal.

In his submission, Mr. Ngwilimi argued that both the trial court and first appellate court misapprehended the evidence and thus came to a wrong finding that the charges against the appellants were proved beyond reasonable doubt. According to the learned counsel, having discredited the evidence of PW2, the High Court should have found that the prosecution had failed to adduce sufficient evidence to prove the allegation that the herds of cattle were found in the game reserve. He added that the evidence of PW3 is equally insufficient on that aspect because, **first,** he did not state the type of the equipment which he used to determine the coordinates and **secondly,** that the cattle were not at the alleged areas at the time of preparing the coordinates and did not thus see them. **Thirdly,** although he mentioned the distance from the entry points to where the herds cattle were allegedly found, he did not specify such points of entry; whether they were within or outside the game reserve.

Mr. Ngwilimi went on to argue that, the maps which were prepared by using the coordinates sent to PW2 by PW3 should not have been relied upon because they were admitted in evidence in disregard of s.64 A of the Evidence Act as amended by s. 46 of the Electronic Transactions Act, No. 13 of 2015. On the evidence of the maps tendered

by PW2, the learned counsel argued that, the same do not have any evidential value because the media through which PW3 sent the coordinates was not disclosed.

Concerning the evidence of PW1, it was Mr. Ngwilimi's argument that the same did not prove that the herds of cattle were found in the game reserve. He urged us to consider the fact that, although in his evidence, the said witness said that during the patrol, he was with 18 wildlife rangers, none of those 18 persons was called to testify.

The learned counsel went on to challenge the findings of the learned first appellate Judge contending that he misapprehended the evidence when he stated that the appellants did not know the boundaries of the game reserve. He referred us to the evidence of DW1 who said that he saw the wildlife rangers driving his cattle but did not follow them because he knew that he required a permit to enter into that area where his cattle had been taken. It was Mr. Ngwilimi's further argument that, although the learned first appellate Judge stepped into the shoes of the trial court to re-evaluate the evidence, he only did so in respect of the evidence of DW4, but did not re-evaluate that of the appellants (DW1 – DW3).

On her part, Ms. Moka started her submission by arguing that, from the proceedings of the trial court, it is clear that all the documentary exhibits tendered by both the prosecution and the defence are of no evidential value because, after their admission in evidence, the same were not read out in court. Relying on the case of **Senso Maswi Mwita & Another v. Republic,** Criminal Appeal No. 518 of 2019 (unreported), the learned Principal State Attorney urged us to expunge them from the record. She went on to argue that, without exhibit P2, the remaining oral evidence of PW1 and PW3 is insufficient to prove the allegation that the cattle were found in the game reserve. She submitted that, whereas in his evidence, PW1 said that he did not know the boundaries of the game reserve, on his part PW3 arrived later at the scene after having been informed of the incident. She thus submitted that their evidence is for that reason, unreliable.

The learned Principal State Attorney went on to argue that, in any case, the evidence of both PW1 and PW3 that the cattle were found in the game reserve ought to have been supported by credible evidence specifying the boundaries thereof and the areas at which the cattle were found. To bolster her argument, she cited the decision of the Court in

the case of **Mosi s/o Chacha @ Iranga v. Republic,** Criminal Appeal No. 508 of 2019 (unreported).

On the finding by the learned first appellate Judge that the appellants did not know the boundaries of the game reserve, Ms. Moka agreed that indeed, DW1 and DW2 said so at pages 31 -32 and 33 of the record of appeal respectively but according to her, the appellants should not have been convicted on the basis of weakness of their defence. She said further that, the learned first appellate Judge erred in failing to find that it is wrong to equate the appellants' failure to understand the boundaries with ignorance of law as was done by the learned trial Resident Magistrate in his judgment.

From the submissions of the learned counsel for the parties, what arises for our determination is whether the evidence tendered by the prosecution had proved that the appellants' cattle were found grazing in the game reserve. As shown above, in her submission, Ms. Moka agreed with the appellants' counsel that the prosecution evidence was insufficient to prove that fact.

The two courts below found that there was ample evidence to that effect. We are alive to the principle that a second appellate court will not readily interfere with concurrent findings of facts by two courts below

unless there are compelling circumstances for such an interference. That principle has been reiterated by the Court in its numerous decisions. For instance, in the case of **Wankuru Mwita v. Republic**, Criminal Appeal No. 219 of 2012 (unreported), it was observed that:

> *"The law is settled that on second appeal, the Court will not readily disturb concurrent findings of facts by the trial and first appellate courts unless it can be shown that they are perverse, demonstrably wrong or clearly unreasonable or are a result of a complete misapprehension of the substance, nature and quality of the evidence, misdirection or non – direction on the evidence, a violation of law or procedure or have occasioned a miscarriage of justice."*

In the case at hand, it is common ground by both Mr. Ngwilimi and Ms. Moka that the two courts below did not only misapprehend the evidence but also violated the procedure for admission of exhibits including exhibits P2, the maps of the game reserve and the coordinates of the areas where the cattle were alleged to have been found. After their admission, those documents were not read out in court.

The argument made by the learned Principal State Attorney concerning improper admission of the exhibits including exhibit P2, is

valid. Since the exhibits were not read out after admission, the omission renders them invalid – See for example the cases of **Robinson Mwanjisi and 3 Others v. Republic**, [2003] T.L.R 218, **Omari Iddi Mbezi v. Republic**, Criminal Appeal No. 181 of 2016 and **Jumanne Mohamed and 2 Others v. Republic**, Criminal Appeal No. 534 of 2015 (both unreported). In **Robison Mwanjisi** (supra), the Court made it clear that admission of a documentary evidence involves three stages of **clearance**, **admission** and of being **read** out. In that respect, with regard to exhibit P2 which was relied upon to found the appellants' conviction, since the last stage of reading out its contents was not complied with, we agree with Ms. Moka that the same ought to be expunged from the record, as we hereby do.

Following expungement of exhibit P2 and because the oral evidence of PW2 was correctly discredited by the learned first appellate Judge, there is no gainsaying, as argued by both Mr. Ngwilimi and Ms. Moka, that the remaining oral evidence of PW1 and PW3 is insufficient to prove the charges against the appellants. That evidence alone is insufficient to prove that the cattle were found grazing within the statutory boundaries of the game reserve. In the case of **Mosi s/o Chacha @ Iranga** (supra) cited by Ms. Moka, the appellants were

convicted of *inter alia*, unlawful entry into Ikongo Game Reserve. The trial court acted on the mere evidence of the prosecution witnesses that the appellant was found in the game reserve. Having assessed the weight of that evidence, the Court had this to say:

> *"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 Ikongo Game Reserve' the trial court must evaluate competing evidence and be satisfied that the 'Mto Rubanda area' is within the Ikongo Game Reserve"*

Likewise, in this case, without a concrete evidence showing that the cattle were grazed within the strict boundaries of the game reserve, we are of the settled mind that the prosecution case was not proved beyond reasonable doubt. The evidence of PW1 and PW3 alone does not suffice to discharge that burden. Consequently, we are in agreement with both the learned counsel for the appellants and the learned Principal State Attorney that this appeal should succeed. In the event, we allow the appeal. Save for the decision quashing the payment of

sustenance costs order, the decision of the High Court is hereby varied. The appellant's convictions are quashed and the sentences meted out on them are set aside. They should be refunded the money paid by them as fines and should each be given back the cattle which were taken from them by the authority of the game reserve or the value of such cattle.

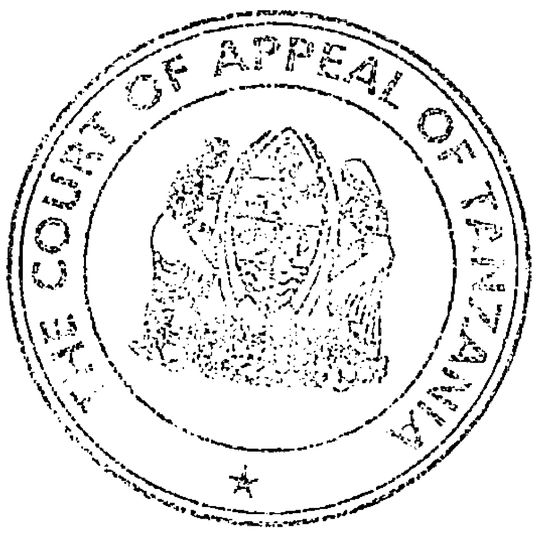
DATED at **TABORA** this 21st day of March, 2022.

A. G. MWARIJA
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

L. L. MASHAKA
JUSTICE OF APPEAL

The Judgment delivered this 22nd day of March, 2022 in the presence of Ms. Flavia Francis holding brief for Mr. Godwin Ngwilimi, Advocate for the Appellants and Mr. Miraji Kajiru, learned Senior State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.



F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL