IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

(CORAM: WAMBALI, J.A., KOROSSO, J.A. And FIKIRINI, J.A.)

CRIMINAL APPEAL NO. 419 OF 2017

MADUHU NHANDI @ LIMBU ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(De-Mello, J.)

Dated the 3rd day of July, 2017

in

Criminal Appeal No. 104 of 2016

JUDGMENT OF THE COURT

7th & 25th February, 2022

WAMBALI, J.A.:

This is a second appeal which has been preferred by the appellant, Maduhu Nhandi @ Limbu to contest the decision of the High Court of Tanzania at Mwanza in Criminal Appeal No. 104 of 2016. Basically, in its decision the first appellate Court upheld the convictions and sentences imposed on him by the District Court of Bunda (the trial court) in Economic Crime case No. 73 of 2015.

Particularly, at the trial court, the appellant and Ayubu Ryobi @ Kisengo, not party to the appeal, were jointly charged with four counts. The first count was unlawfully entering in the National Park contrary to sections 21 (1) (c) and 29 of the National Park Act [Cap 282 R.E. 2002]

(the NPA). The particulars in support of the count were to the effect that, the appellant and Ayubu Ryobi @ Kisengo on the 21st September 2015 at Grumeti area within Serengeti National Park Bunda District in Mara Region did unlawfully enter into Serengeti National Park without the permission from the Director previously sought and obtained.

The second count concerned the offence of unlawful possession of weapons in the National Park contrary to section 24 (1) (b) and (2) of the NPA read together with paragraph 14 (c) of the Economic and Organised Crime Control Act [Cap 200 R.E. 2002] now R.E. 2019 (the EOCCA). The particulars in respect of this count alleged that the appellant and another person stated above, on the same date, area, district and region were unlawfully found in possession of weapons in the National Park to wit; two (2) knives, one (1) spear, two (2) machete and four (4) animal trapping wires without permission from the authorized authority.

In the third count the appellant and another were charged for unlawful hunting in a National Park contrary to section 23(1) of the NPA read together with Paragraph 14 (a) of the First Schedule of the EOCCA.

It was indicated in the particulars with regard to this count that on the same date, area, district and region, the appellant and another were

found hunting Game Animals to wit: seventeen (17) Thomson Gazelle and one (1) Warthog without permission from the authorized authority.

Lastly, the fourth count involved unlawful possession of Government Trophy contrary to section 86 (1) (2) (c) (ii) of the Wildlife Conservation Act, No. 5 of 2009 and Paragraph 14 (2) of the EOCCA.

Similarly, it was alleged in the particulars in respect of this count that the appellant and another on the same date, area, district and region were found in unlawful possession of Government trophy to wit; seventeen carcasses of fresh meat of Thomson Gazelle valued at USD 8500, equivalent to TShs. 18,275,000/=; one carcass of fresh meat of Warthog valued at USD 450, equivalent to TZS. 967,500.00 both valued total at USD 8,950 equivalent to TZS. 19,242,500.00 without valid license from authorized authority.

According to the record of appeal, after they were formally arraigned at the trial court, the appellant and another pleaded not guilty to all counts, and consequently, a trial commenced. During the trial the prosecution relied on three witnesses, namely, Deus Kisabo (PW1), Kumalija Fumbuka (PW2) and Henry Kwambaza (PW3). In addition, three exhibits namely, the weapons stated above, trophy valuation

certificate and Inventory of the seized trophy were also tendered and admitted as exhibits P1, P2 and P3 respectively.

Basically, the substance of the brief evidence of PW1 and PW2 is that on the material date, that is, 21st September, 2015 they arrested the appellant and another at Grumeti area, within Serengeti National Park in possession of the weapons and the carcasses of fresh meat of seventeen Thomsom Gazelle and one Warthog which they had already hunted and were in the process of skinning them. PW1 and PW2 then took the appellant and another to Anti-Poaching Unit (APU) office at Bunda together with the stated exhibits and handed them to the authority for legal action as they had no permits.

On his part, PW3 testified that on 21st September 2015 he was at APU office at Bunda where he was assigned to identify the ceased trophy and prepare a valuation certificate. He testified further that after he identified and prepared the trophy valuation certificate which indicated a total value of TZS. 19,242,500.00, he took the carcasses to the Magistrate at Bunda who ultimately, issued an order for disposal of the carcasses. It is PW3 who tendered exhibits P2 and P3. Based on three witnesses and three exhibits, the prosecution maintained that the

case was proved beyond reasonable doubt against the appellant and another.

On the other hand, the appellant and another defended themselves and they had no witness to support their defence. Particularly, the appellant testified that on 21st September, 2015 he went to fetch water in the river for the purpose of making bricks. To his surprise, he stated, he was kidnapped by Game Warden from Mzungu who took him to their camp. He added that on 23rd September, 2015 he was sent to the trial court where he was charged with the offences he did not know. When he was cross-examined, he emphasized that he went to fetch water outside the Game Reserve and that the Game Warden who arrested him did not tell him the allegations which led to his arrest on that particular day.

As it were, at the height of the trial, the trial District Court was satisfied that the prosecution proved the case against the appellant beyond reasonable doubt. It thus convicted him on all four counts. Accordingly, he was sentenced to pay a fine of TZS. 20,000.00 or to serve two years imprisonment in default for the first, second and third counts respectively, and twenty years imprisonment for the fourth

count. Aggrieved, he unsuccessful appealed to the High Court in Criminal Appeal No. 104 of 2016, hence this second appeal to the Court.

It is noteworthy that initially, the appellant lodged a memorandum of appeal comprising six grounds of appeal followed by a supplementary memorandum of appeal advancing five grounds of appeal.

At the hearing of the appeal, the appellant who appeared in person, unrepresented, urged us to consider his grounds of appeal contained in the two memorandum of appeal and allow the appeal. Briefly, he contended that the prosecution did not prove the case beyond reasonable doubts. He did not wish to add on the substance of the grounds of appeal as he was convinced that he had explained sufficiently in each of the ground found in the memoranda of appeal. In the end, he requested us to let the counsel for the respondent Republic reply to his complaints and retained the right to rejoin if need would arise.

Ms. Dorcas Akyoo and Ms. Georgina Kinabo, learned Senior State Attorney and State Attorney respectively, appeared for the respondent Republic. It is Ms. Akyoo who addressed the Court in response to the appellant's complaints on the grounds of appeal.

We must state at the outset that having scrutinized the appellant's grounds of appeal and heard the submission of the learned Senior State Attorney, we are of the decided opinion that the determination of this appeal is centered on the overall ground, which is to the effect that; the first appellate judge erred in law and fact to confirm the decision of the trial court that the prosecution proved the case against the appellant beyond reasonable doubt. We will therefore deal with this general ground which essentially focuses on three issues.

From the grounds of appeal, we note that the thrust of the appellant's assertion that the prosecution did not prove its case beyond reasonable doubt is pegged on the following points. One, that the prosecution did not prove the actual place within the statutory boundaries of the Serengeti National Park where the appellant was arrested for having unlawfully entered therein as alleged in the particulars of the first count. Two, that some exhibits, namely, P2 and P3 were irregularly tendered, admitted and relied in evidence to ground the appellant's conviction. Three, that the appellant's defence raised reasonable doubt to the prosecution case which was not resolved in his favour.

In response to the appellants complaints on the above alluded to issues, Ms. Akyoo contended that the appellant was properly charged in respect of the first count. He submitted that the provisions of sections 21 (1) (a) and 29 of the NPA prohibits unlawful entry into the National Park without permit of the Director previously sought and obtained. In this regard, the learned Senior State Attorney firmly submitted that according to the evidence on the record, particularly that of PW1 and PW2, it was proved that the appellant was arrested within the boundaries of Serengeti National Park at Grumeti area. She thus prayed that this complaint be dismissed.

With regard to the reliability of exhibits P2 and P3 which were not read over to make their contents known to the appellant after they were admitted in evidence, Ms. Akyoo conceded to the irregularity and urged us to disregard them in determining the appeal. However, she firmly argued that the oral evidence of PW3 in the record of appeal suffices to ground conviction of the appellant on the three counts. She explained that PW3 testified how he identified the Government trophies which were found in possession of the appellant after his arrest and prepared a certificate of valuation, and later sought and obtained an order of disposal of the carcasses before the Magistrate at Bunda.

Lastly, she submitted that the appellant's defence in the record did not raise reasonable doubt to the prosecution case as all the witnesses proved that he committed the offence on the material date. To this end, she argued that the case against the appellant was proved to the required standard. In the circumstances, she pressed us to reject the appellant's complaint that the prosecution case was not proved beyond reasonable doubt and ultimately, dismiss the appeal in its entirety for being preferred without substance.

In the first place, in determining this appeal, we need to consider whether the provisions of section 21 (1) (a) of the NPA under which the prosecution charged the appellant in respect of the first count, still creates the offence of unlawful entry into the National Park after the amendment effected by Act No. 11 of 2003. For clarity, the respective section provides as follows: -

> *"21 (1) Any person who commits an offence under this Act, shall on conviction, if no other penalty is specified, be liable-*
>
> *(a) in the case of an individual, to a fine not exceeding five hundred thousand shillings or to imprisonment for a term not exceeding one year or to both that fine and imprisonment,*

(b) any person who contravenes the provisions of this section commits an offence against this Act."

On the other hand, section 29 of the NPA which was jointly indicated in the statement of offence with section 21(1) (a) of the NPA provides for general penalty upon conviction of any person who commits an offence against the NPA if no other penalty is specified therein.

We gather from the reproduced current provisions of section 21 (1) (a) of the NPA that there is no offence which is created which could have necessitated the conviction of the appellant as it was done by the trial court and confirmed by the first appellate court.

It is significant to state that before the amendment effected by Act No. 11 of 2003, section 21 of the NPA clearly disclosed an offence of unlawful entry into national parks in the following terms: -

"21(1) Subject to the provisions of section 15, ***it shall not be lawful for any person other than:*** *-*

(a) the Trustees, and the officers and servants of the Trustees; or

(b) public officer on duty within the national park and his servants, ***to enter or be within a national park except under and in accordance with a permit in that behalf***

issued under regulations made under this Act.

(2) Any person who contravenes the provisions of this section commits an offence against this Act."

[Emphasis added.]

From the foregoing, it is clear to us that the appellant was charged and convicted under section 21 (1) (a) of the NPA in respect of the first count which does not disclose any offence. Indeed, the appellant could not be sentenced under section 29 which contain several subsections, while he had not been convicted of an offence under section 21 (1) (a) as it does not create the offence of unlawful entry into a national park without permission.

It is in this regard that, in an akin situation, in **Dogo Marwa @ Sigana and Mwita Baitom @ Mwita v. The Republic**, Criminal Appeal No. 512 of 2019 (TANZLII), we stated that:-

> *"It is now apparent that the amendment brought under Act No. 11 of 2003 deleted the actus reus (illegal entry or illegal remaining in a national park) and got confusion in section 21 (1) of the NPA. As far as we are concerned, the appellants were charged, tried, convicted, and sentenced for a non-existent offence of unlawful entry into Serengeti National Park."*

We associate ourselves with the above holding as it equally applies in the circumstances of this appeal in respect of the charge, trial, conviction and sentence of the appellant for non-existing offence contrary to the allegation in the first count.

We now turn to determine the charges in respect of all the counts by considering the allegation of the prosecution that the appellant was arrested by PW1, PW2 at Grumeti area within the boundaries of Serengeti National Park.

Admittedly, in finding that the appellant and another were arrested within the boundaries of Serengeti National Park, the learned Senior Resident Magistrate considered the evidence for the prosecution witnesses and their defence and stated as follows: -

> *"Again, lined with this was exhibit PI which was the weapons tendered by PW1. These were two pangas, two knives, a spear and four trapping wires. The witnesses told the court that they arrested both accused persons inside the park and while possessing these weapons and the Government trophies. The evidence leaves no doubt that accused person were arrested in SENAPA by PW1 and PW2 while in possession of weapon and the Government trophies. I have in detail gone through accused defences and they allege that*

they went to fetch water for bricks making but they admit that they did not know the boundaries between the park and the village. This draws a conclusion that even accused do not know whether they were arrested in the park or outside it. Taking the evidence of PW1 and that of PW2 into scrutiny it is my satisfied view that both accused were arrested inside SENAPA while in possession of weapons and Government trophies.

There was no evidence from accused person proving that they had permits authorising them to enter into the park and perform any act that they were performing. Although the burden of proof was the prosecution side but to prove whether they had permits or not was on the accused persons.

Prosecution has proved that accused did not have permits and to prove the otherwise lies on the accused persons. It is from the foregoing that I am of the satisfied view that both accused were arrested inside the National Park while hunting and in possession of weapons and Government trophies contrary to the law..."

It is not out of place to point out that the above finding was confirmed by the first appellant judge who stated thus:-

"What more can I gather from this straight forward case against the appellants if not confirming the District Trial Court findings?...

No proof of where else the Appellants were based on that date but, on River Grumeti and inside the park. This is the same river that they were drawing water as they never mentioned any other."

From the foregoing, we regrettably, with respect, state that both the trial and first appellate courts misapprehended the substance of the appellant and another defences. We harbour no doubt that the appellant and the other accused defences are not consistent with what has been stated by the two courts below in the extract reproduced above. For avoidance of doubt, as the appellant and the other accused defences are fairly brief, we deem it appropriate to reproduce the same hereunder:-

"DW1 MADUHU NHANDI.... I remember on 21/9/2015, I went to fetch water in the river for brick making. I was kidnapped by Game Warden from Mzungu who arrested me and took me to their camp. I was brought to police Bunda and on 23/9/2015 I was brought to court where I was charged with this case which I don't know. That's all."

When cross – examined by the prosecutor, the appellant stated: -

"The Game Warden who arrested me were unknown to me. I live with my younger brother and don't know of my arrest. I went to fetch water outside the Game Reserve. The Warden didn't tell my accusations."

On his part, DW2 AYUBU RYOBI KISENGO, the appellant's co-accused stated as follows in his defence: -

> *"I remember on 21/9/2015 I left my home to assist Maduhu (1st accused) in brick making. We went to fetch water where we were arrested at Rubana River. We were taken to the camp and then to Bunda Police. On 23/9/2015 we were charged in court with this case. That's all."*

When cross-examined by the prosecutor, DW2 stated that: -

> *"I was arrested at Rubana River. I don't know the boundaries of the Game Reserve. The officer who arrested me were unknown to me. I was not arrested with weapons or government trophies. We were just two people. My relatives don't know my whereabout now."*

Admittedly, we note that from their respective defences neither the appellant nor Ayubu Ryobi Kisengo mentioned Grumeti River as found by the first appellate Judge. According to their defences, they raised doubt as to whether they were really arrested within the boundaries of Serengeti National Park as alleged by the prosecution. More importantly, the fact that they stated that they were not aware of the boundaries of the game reserve did not shift the burden for them to prove that they

were not found in the boundaries of Serengeti National Park as founds by the courts below and supported by the learned Senior State Attorney.

On the contrary, in the light of the appellant's and his co-accused defences, the prosecution through PW1 and PW2 was duty bound to prove that the appellant and another were found in Grumeti area within Serengeti National Park as alleged in the particulars of all counts referred above. We must emphasize that in criminal trials, the general rule is that, it is the prosecution and not the accused, except for exceptional cases, who has the burden of proving the case against accused person. For this stance see **Joseph John Makane v Republic** [1986] T.L.R. 44, **Mohamed Said Matula v. R** [1995] T.L.R. 3, and **Anatory Mutafungwa v. The Republic,** Criminal Appeal No. 267 of 2010 (unreported), among others.

Unfortunately, in the case at hand, both PW1 and PW2 gave generalized testimony that they were on patrol at Grumeti River inside SENAPA and that they managed to arrest the appellant and another inside SENAPA. Indeed, their evidence on the particular area where they arrested the appellant and another differed. Particularly, PW1 stated:-

> *"We saw sign of people and made follow up where we managed to find two people in bushes. We surrounded the people and arrested them."*

When cross -examined by the appellant (DW1) PW1 stated: -

> *"We arrested you inside SENAPA while in possession of wild animals' carcass that you had killed. You know how you got to that area."*

When cross – examined by DW2-PW1 responded as follows: -

> *"We arrested you while hunting animals. You were skinning them after hunting."*

On his part PW2 stated thus in relation the area of arrest: -

> *"...we managed to arrest two people inside SENAPA."*

When cross-examined by the appellant (DW1) he testified that: -

> *"We arrested you at Grumeti River inside SENAPA ... we found you in bushes."*

When cross-examined by DW2, PW1 stated that: -

> *"We arrested you at Grumeti River inside SENAPA where you had a camp skinning wild animals..."*

Section 5(1) of the NPA describe the statutory boundaries of the Serengeti National Park. It states that: -

> *"The area specified in the First Schedule to this Act is declared a national park to be called Serengeti National Park:..."*

Considering the above stated evidence, we are increasingly of the settled opinion that the prosecution witnesses, that is, PW1 and PW2

were supposed to prove that the appellant and another were arrested in a particular area specified in the First Schedule to the NPA which provides the outline of the boundaries of the Serengeti National Park. Thus as the allegation in the charges was that they were arrested at Grumeti area, they had to give evidence which is in conformity with the description of the boundaries stipulated in the First Schedule to the NPA.

In the circumstances, considering the uncertainty of the testimonies of PW1 and PW2 concerning the exact place where the appellant and another were arrested within the boundaries of the Serengeti National Park as stipulated by the law alluded to above, we have no hesitation to state that the appellant defence raised reasonable doubt on whether he was arrested within the boundaries of SENAPA. To this end, the doubts had to be resolved in his favour by both the trial and first appellate courts.

In the case of **Cheyonga Samson Nyambare v. The Republic**, Criminal Appeal No. 510 of 2019 (TANZLII), in which the prosecution did not explain beyond reasonable doubt if truly the area in which the appellant was found grazing cattle was within Serengeti National Park, the Court stated that: -

"Since 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 burden to the accused person where PW1 and PW2, the two prosecution witnesses, merely narrates that game scouts arrested the appellant inside Ikonongo Game Reserve without demonstrating the area of the arrest of the appellant to be within the statutory boundaries of that reserve."

Similarly, in the instant appeal, as we have amply demonstrated above, it was not sufficient for PW1 and PW2 to simply state in general that the appellant was arrested in Grumeti River or in the bushes within Serengeti National Park without showing that the said area is within the statutory limits described by the First Schedule to the NPA. The prosecution had to prove the allegation in the particulars of the counts by demonstrating the particular place of Grumeti area which fell within the statutory boundaries of SENAPA. Regrettably, according to the evidence on record, this was not accomplished by the prosecution.

The next point for our consideration is the reliability of exhibits P2 and P3 in grounding the conviction of the appellant. Noteworthy, the learned Senior State Attorney conceded that exhibits P2 and P3 were not read over to make their contents known to the appellant after they were tendered and admitted as required by law. Thus, she agreed that

they were wrongly relied in evidence. She therefore prayed that they should be disregarded in the determination of the appeal. We accordingly disregard them.

Nonetheless, Ms. Akyoo forcefully submitted that the oral evidence of PW3 on the trophy valuation certificate suffices to show that the Government trophies which were found in the appellant's possession was valued on the same day of the arrest and later the carcasses were sent to the Magistrate who issued the order of disposal.

On our part, we do not subscribe to Ms. Akyoo's submission that the oral evidence of PW3 can assist in proving that the government trophies were found in possession of the appellant after his arrest. It only shows that the valuation of the Government trophies was done.

Besides, PW3 did not state who handled the government trophies to him for valuation. He simply stated that he was assigned to identify and give value. Unfortunately, both PW1 and PW2 who handed the Government trophies to APU offices at Bunda did not specify to whom they handed the trophies together with the appellant and another. Indeed, it is plain in the prosecution evidence on record that there was no indication that it was PW1 and PW2 who handed the trophies and the appellant and another to PW3. This creates doubt on how PW3 came

into the custody of the trophies and the appellant. The doubt becomes more apparent because the record is also silent on whether the appellant appeared before the Magistrate when PW3 sent the trophies for seeking an order of disposal.

On the other hand, we note that, though Ms. Akyoo conceded that there is no evidence that the appellant appeared before the Magistrate, she maintained that there is evidence to show that the trophies were found in the possession of the appellant as the Magistrate issued an order of disposal of the carcases after his arrest.

We must emphasize that the presence of the accused before the Magistrate which must be followed by signing the inventory before the Magistrate issues a disposal order, is a requirement of law and its omission curtails the right to be heard (see **Mohamed Juma @ Mapakana v. The Republic**, Criminal Appeal No. 385 of 2017 (unreported).

Lastly, considering our foregoing deliberation and taking the evidence on the record as a whole, we have no hesitation to state that the prosecution did not prove the case against the appellant beyond reasonable doubt in respect of all the counts that were placed at his door.

Accordingly, we resolve the doubt in favour of the appellant. Consequently, we allow the appeal, quash the conviction and set aside the sentences imposed thereon. Ultimately, we order that the appellant be set free unless held for some other lawful cause.

DATED at **MWANZA** this 25th day of February, 2022.

F. L. K. WAMBALI
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

The Judgment delivered this 25th day of February, 2022 in the presence of the appellant in person and Ms. Georgina Kinabo, learned State Attorney for the respondent/Republic is hereby certified as a true copy of original.

G. H. Herbert
DEPUTY REGISTRAR
COURT OF APPEAL