IN THE HIGH COURT OF TANZANIA

AT BUKOBA

HC CRIMINAL APPEAL NO. 39 OF 2017

(Arising from the decision of the Biharamulo District Court in Criminal Case No. 150 of 2017)

1. FRANCIS SAVEL
2. LUBALEMA MAKANIKA ..... **APPELLANTS**
3. JAMALI AKILI

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS..RESPONDENT

JUDGMENT

27.06. & 27.07.2018
BONGOLE, J.

At the District court of Biharamulo the appellants were charged on two counts of unlawful entry into game reserve contrary to **section 15(1)(2) of the Wildlife Conservation Act No.5/2009 and unlawful grazing of livestock contrary to section 18(2)(4) and section 111(1)(a) (3) also of the Wildlife Conservation Act No.5/2009.**

The particulars of the offence in the first count were that FRANCIS S/O SAVELI, LUBALEMA S/O MAKANIKA and JAMALI S/O AKILI on the 9th of April, 2017 within Biharamulo game reserve in Kagera Region during morning hours did unlawfully enter into the said game reserve without a written permit from the Director of Wildlife previously sought and obtained.

In the second count the particulars of the offence were that FRANCIS S/O SAVELI, LUBALEMA S/O MAKANIKA and JAMALI S/O AKILI on the 9th of April, 2017 within Biharamulo game reserve in Kagera Region during morning hours did unlawfully graze four hundred (400) hears of cattle into the said game reserve.

When the charge was read and explained to the accused persons they pleaded not guilty. In order to prove the case the prosecution called six witnesses. In defence there were five witnesses, the accused persons inclusive.

After hearing both sides of the case, the learned Senior Resident Magistrate was satisfied that the case against the accused persons now appellants was proved beyond reasonable doubts. She convicted them on both counts and sentenced each to pay fine of Tshs. 50,000/- for each count or one year imprisonment in

default. The four hundred cattle were ordered to be forfeited by the Government.

Aggrieved, the appellants appealed against conviction and sentence on four grounds coached thus:-

1. ***That, after it was proved in evidence that the appellants were found almost 10 kilometres away from the game boundaries, the trial Resident Magistrate erred in law and fact in convicting the appellants for the two counts charged, and also misconceived the evidence and the exhibit tendered in court.***
2. ***That, the trial Resident Magistrate grossly erred in law and fact for not considering the evidence of defence witnesses, thus the Appellants' rights to be heard were defeated and the rule of fair trial was prejudiced.***
3. ***That, in convicting the Appellants the trial Resident Magistrate erred in law on heavily relying on prosecution evidence to the extent of making her decision one sided.***
4. ***That, the trial Resident Magistrate grossly misdirected herself at law and on facts to convict the appellant while the prosecution never proved the case to the standards required by law.***

The abbreviated facts of the case are that the incident of entering the game reserve is alleged to have taken place on the 9th April, 2017. On that date PW1- Lucas Mwigani and 9 other officers from TANAPA and Police force were on patrol where they arrested the appellants grazing herds of cattle in the game reserve. They arrested and counted the cattle in the presence of the appellants and prepared a certificate of seizure. The certificate was tendered at the trial as exhibit "P1". Apart from the certificate of seizure they drew the sketch place of the reserve which was admitted as exhibit "P3".

Having completed all that the accused persons now appellants were arraigned before the Biharamulo District Court for the charge of unlawful entering and grazing in game reserve. As stated before the accused persons were convicted and sentenced to pay fine of Tsh.50, 000/= each on both counts failure of which they would be imprisoned to one year imprisonment. The herds of cattle were further ordered to be forfeited for Government and place before the Director of Wildlife for Disposal.

At the hearing of this appeal before this court the appellants were represented by Ms. Aneth Lwiza learned counsel while the respondent was represented by Mr. Athuman Matuma learned Senior State Attorney.

On the first ground Ms. Aneth submitted that the trial court erred to convict the appellants because the alleged cows were found away from the game reserve. She submitted that the basis of conviction was the sketch plan exhibit P3 which was tendered by PW6 H.5828 DC Juma at page 17 of the typed proceedings. She submitted that though the sketch plan was contradictory, the trial Magistrate relied on it in convicting the appellants.

She went on submitting that according the sketch plan point "A" from the key is where the cattle were found and point "B" is where the game reserve of Biharamulo but the witness, PW6 never interpreted that sketch. She argued that the appellants were at 10 kilometres out of the reserve which meant that the appellants were outside the reserve. She maintained that if the evidence of DW4 is to be considered one cannot say that the appellants were found inside the game reserve.

In respect of the second ground she submitted that the trial magistrate failed to take into account the defence of the appellants. That at page 12 of the judgment the trial magistrate framed two issues basing on the two counts charged. She analyzed all the prosecution evidence and the witnesses' demeanor and the submission of the State Attorney and convicted the appellants. She challenged the analysis for failure to

consider the defence side evidence especially that of DW4 who was the free agent in stating what he saw at the material time.

It was Aneth's further submission that on 12.04.2017 the PH was conducted and the names of the intended witnesses and exhibits mentioned. That among the exhibits the sketch plane was not mentioned. She submitted that though her clients objected to the said exhibit the same continued to be admitted. She argued that this was not a fair trial as the appellants were prejudiced. She added that this violated **section 192 of the Criminal Procedure Act [Cap.20 R.E.2002]** whose purpose to ensure that an accused person is not taken by surprise. She supported her submission with the case of **Mussa Mwaikunda V.R [2006] TLR No.387** where it was held that an accused person must understand the nature of the trial. In her view, by admitting the sketch plan which was not introduced at the PH was a denial to the appellants to know the nature of the case against them.

Submitting on the 3rd ground, Ms.Aneth faulted the trial court magistrate in that she was bias to rely only on the prosecution evidence of PW1, PW2, PW3 and PW4 without saying anything on the defence side.

She submitted that the trial magistrate ought not to rely on the evidence of PW6 because at page 17 of the proceedings he stated to have interrogated the accused persons and they admitted to have entered into the game reserve. That at the PH the prosecution intimated to tender the caution statements but the same were never tendered at the trial by PW6. She added that at page 18 of the proceedings PW6 said that he knew the accused persons before contrary to the findings of the learned trial magistrate that the prosecution witnesses never knew the appellants before. In this contradiction, she invited this court to expunge the evidence of PW6 and exhibit P3 from the record. In her view, this is a serious contradiction which creates doubt on the prosecution case. She relied on the case of **Wilfred Lucago V. R [1994] TLR No. 189** where it was held that whenever there is serious contradiction the same must benefit the accused person.

She eventually prayed this court to quash conviction, set aside the sentence and orders of the trial court and allow this appeal.

In reply, Mr. Matuma disagreed with the assertion of Ms. Aneth that the case at the trial based on the sketch plan and credibility of witnesses. He submitted that all the prosecution witnesses stood firmly in telling the trial court that the appellants were

arrested in the game reserve but the appellants defended themselves that they were arrested near the game reserve. He submitted that under the circumstances the point was not the sketch plan but the credibility of witnesses. That on the issue of credibility the trial court evaluated the prosecution witnesses more than those of defence as it can be noted at pages 13 and 14 of the typed judgment. In Matuma's view, this was done because the trial magistrate saw those witnesses to be consistent and straight forward. That the court considered the defence evidence but discredited as there were grudges between the two sides and that they never knew each other. On this Mr.Matuma commented that, the trial magistrate was right to give credit the evidence of the prosecution. He added that it is the law that whenever the issue of credibility arises, the trial court findings binds on the appellate court unless there are circumstances to compel re- assessment of credibility of witnesses. He substantiated his submission by citing the cases **of Omari Ahmend v.R[1983] TLR No.52 and Goodluck Kyando v R,[2006] TLR No.363** where it was held that every witness is entitled to credence save for good reasons to disbelieve him. In his view, there are no reasons to disbelieve the prosecution witnesses. He invited this court to look at the evidence of PW1 up

to PW5 which was also supported by the accused persons who were represented in their defence. He submitted that DW1 stated in his evidence in chief at page 19 that they were arrested behind the game reserve but on cross examination at page 20 of the typed proceedings he stated that for the whole time they used to graze in the game reserve and that only a week before they had been ordered to move their cows. That DW2 also conceded to DW1 that they used to graze in the reserve and that they were told to move out of the game reserve. That he insisted that if it was not the government which ordered them to move they could not do so because they had nowhere to take their cows.

He submitted that DW4 stated at page 26 that when he saw the cows being taken he told them that they should be grazed in his farm so, in Matuma's view, this corroborated the prosecution case thus there is no need for this court to re-evaluate the evidence.

He went on submitting that according to the evidence of PW6, the patrol was being conducted in the game reserve and not outside so, this implied that even the arrest of the appellants and cows was done inside the game reserve not otherwise. That what PW6 did was to show in the sketch plan the exact point of the place where they arrested the appellants.

In respect of PH, he submitted that PH in the subordinate court is not that much necessary as opposed to that of the High Court. He supported this argument with the cases of **Pangani Msemakweli V.R[1997] TLR No. 331 and Yusuph Mchira V. DPP Criminal appeal No.174/2007 CAT Arusha Registry (unreported)** where it was held that if PH is not conducted it cannot vitiate proceedings and that in the subordinate court no need even to mention the names of witnesses and exhibits.

On the sentence, he prayed this court to vary it under section 366(1)(b) of the CPA arguing that the appellants in the first count were charged under section **15(1)(2) of the Wildlife Conservation Act** according to which the punishment is not less than Tsh.100,000/= but not exceeding Tshs.500,000/= or imprisonment not less than one year and not more than 3 years in default. He argued that in this case the appellants were fined Tshs. 50,000/= or one year in default contrary to the law.

He went on submitting that, in the 2nd count the charge was contrary to section 18 of the same Act which requires the fine to be Tshs.300,000/= and not more than 5,000,000/= but the trial magistrate imposed Tshs.50,000/= contrary to the law.

He prayed for dismissal of this appeal.

In rejoinder, Ms.Aneth maintained that issue of fair trial is important thus it should not be waived rightly as Mr.Matuma tried to under estimate it. She maintained that the credibility of PW6 and others be re-evaluated and the sketch plan be expunged but maintained that all the defence witnesses stated that they were arrested outside the game reserve. She conceded with the prayer to vary the sentence but prayed the appeal to be allowed.

Having heard the submission of the learned counsel and Senior State Attorney and perused the record of this appeal, there is no dispute that the appellants were arrested grazing cattle save that the issue is whether they were arrested in the game reserve of Biharamulo. The complaint of the Counsel for the appellants was that they were arrested 10 kilometres away from the game reserve. She challenged the sketch plan on ground that it was vague leave out the fact that it was not mentioned at the preliminary hearing. She invited this court to expunge it from the record. She further invited this court to discredit the evidence of PW6-H5828 DC Juma for the reason that he stated that he knew the appellants before. On his part, Mr. Matuma had it that even if this evidence is expunged there is still enough evidence to pin point the appellants.

My observation on this contention is that the evidence of PW1- Lucas Mwigani, and PW2- Leonard Gabusa at page 7 of the typed proceedings, prove that the appellants were arrested in the game reserve. In their evidence in chief they consistently testified that the patrol was conducted in the game reserve where they arrested the appellants. Even when the appellants were cross-examined whether they had grudges with the prosecution witnesses at page 20 of the typed proceedings, they stated that they had none and that the prosecution witnesses had no reason to tell lies against any of the accused persons. At this juncture, I subscribe to the view of Mr. Matuma that even if the sketch plan is expunged from the record, the evidence of the rest of the prosecution witness is cogent thus enough to pin point at the appellants. The complaint that the said sketch plan was not mentioned at the PH does not vitiate the proceedings especially after I have held that the other evidence of the prosecution case is strong enough to prove the case.

In as far as evaluation of the evidence of the defence side is concerned; I partly agree with Ms. Aneth that the trial magistrate mostly relied on the evidence of the prosecution. However, I do not think that this implied that the accused persons defence was not considered. At page 14 of the typed judgment the learned

magistrate considered the defence and explained the reason which moved her to disbelieve the defence evidence. As this case heavily relied on credibility of the witnesses, I have no reason on my part to question the findings of the trial court on this. Having read the record of this appeal I am convinced that the prosecution case was proved beyond reasonable doubts against the accused persons.

On the sentence, I agree with Mr. Matuma that the sentence of TShs. 50,000/= or one year imprisonment in default is contrary to the law in as far as the first count is concerned. **Subsection (2) of the Wildlife Conservation Act No.5/2009** imposes the fine of not less than one hundred thousand and not exceeding five hundred thousand shillings. Section (1) (2) above provides thus:-

> *"Any person other than a person travelling 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.*
>
> *(2) Any person who contravenes any provision of this section or any condition attached to any authority granted under subsection (I), commits*

an offence and on conviction shall be liable to a fine of not less than one

hundred thousand shillings, but not exceeding five hundred thousand shillings

or to imprisonment for a term of not less than one year but not exceeding

three years or to both."

On the second count of unlawful grazing in the game reserve, section **18(2)(4) of the Wildlife Conservation Act No.5/2009 provides:-**

"(2) Any person shall not graze any livestock in a game reserve or Wetlands reserve.

(4) Any person who contravenes subsection (2) commits an offence and on conviction shall be liable to a fine of not less than three hundred thousand shillings and not exceeding five million shillings or imprisonment for a term of not less than two years but not exceeding five years or to both"

As it can be noted above, the fines imposed by the learned trial magistrate were less than the ones provided for under the law. With due respect to the learned senior resident Magistrate, she erred in law to impose the sentence not provided for under the law. I invoke the powers provided for under **section 366(1) (b) of the Criminal Procedure Act [Cap.20 R.E.2002]** which

empowers this court to vary a sentence, to set aside the fine of TShs.50, 000/= on each count. Instead, on the 1st count the appellants are hereby sentenced to pay fine of Tshs. 100,000/- or one year imprisonment in default and in the 2nd count, they are hereby sentenced to pay fine of Tshs.300, 000/= or two years imprisonment in default.

In the upshot, this appeal is hereby dismissed in its entirety for want of merits.

S.B. Bongole

Judge

27/7/2018

Date: 27/7/2018

Coram: Hon. S. B. Bongole, J.

1st Appellant:
2nd Appellant: -Ms. Aneth Lwiza, Advocate
3rd Appellant:

Respondent: Mr. Haruna, SA.

B/C: Gosbert Rugaika

Mr. Haruna:

My Lord, the appeal comes for judgment and we are ready.

Court:

Judgment delivered in the presence of Ms. Aneth Lwiza for appellants who are absent and in the presence of Mr. Haruna Shomari, SA for the Respondent in my presence this 27th July, 2018.

Sgd: S.B. Bongole

Judge

27/7/2018

Ms. Aneth Lwiza:

My Lord, I pray for time to trace the 2nd and 3rd appellants so as they may pay the increment of fine that has been passed. For the 1st appellant, I pray for his Arrest Warrant.

Mr. Haruna:

My Lord, I pray arrest warrant against 1st appellant who entered appearance in court be issued so as he may serve his sentence. As the 2nd and 3rd appellants have never attended in court and from the fact the observation of their non appearance has already be determined by this court, I pray the defence counsel be given 3 days from today to either bring the 2nd and 3rd appellants in default she bares their burden as she said she had instructions from them

Ms. Lwiza:

My Lord, its true I have been representing the 3 appellants. The 1st appellant has been appearing in court and I am not objecting a prayer that he be arrested.

For 2nd and 3rd appellants I pray for 14 days time so as I may search for them so as they may comply with the courts order.

S.B. Bongole

Judge

27/7/2018

Order:

1. The 1st Appellant who once appeared i.e. FRANCIS SAVEL Arrest Warrant to issue so as he may save his sentence.
2. The 2nd and 3rd Appellants who never entered appearance i.e. LUBALEMA MAKANIKA and JAMALI AKILLI, and whereas the Advocate stated to have proper instructions from them; I hereby give 7 days from today for the Advocate Ms. Aneth Lwiza to bring them and or to comply with court sentence.

Ordered accordingly.

S.B. Bongole

Judge

27/7/2018