

**IN THE HIGH COURT OF TANZANIA**

**MUSOMA DISTRICT REGISTRY**

**AT MUSOMA**

**CRIMINAL APPEAL NO 18 OF 2020**

**GHATI MAGAIGWA KIHORE**\_\_\_\_\_ **APPELLANT**

**VERSUS**

**THE REPUBLIC**\_\_\_\_\_ **RESPONDENT**

*(Arising from the Decision and Orders of the District Court of Tarime at Tarime,  
Mugendi RM, in Economic Case No 62 of 2017 dated 18.01.2019)*

**JUDGEMENT**

Date of last Order; 21.04.2020

Date of judgment; 08.05.2020

**GALEBA, J.**

This appeal arises from the decision and orders of the district court sitting at Tarime in economic case number 62 of 2017 in which the appellant was charged along with **NSONGO MAGAIGWA MWITA** and **OBOGO OBOGO NYANDOTO**. They were charged with the offences of unlawful entry into the National Park contrary to sections **21(1)(a) and (2) and 29(1) of the National Parks Act [Cap 282 RE 2002]** as amended by **the Written Laws (Miscellaneous Amendments) Act No. 11 of 2003 (the NPA)**, unlawful possession of weapons in the National Park contrary to **section 24(1)(b) and (2) of the NPA** and unlawful possession of Government Trophies contrary to **section 86(1) and (2)(c)(ii) of the Wildlife Conservation Act no. 5 of 2009** as amended by Section 59 of the **Written Laws (Miscellaneous Amendments) Act No. 2 of 2016 (the WCA)** read together with paragraph 14 of the first schedule of the **Economic and Organized Crime Control Act (Cap 200 RE 2002)** as amended

by sections 13 and 16 of the **Written Laws (Miscellaneous Amendments) Act No. 3 of 2016** (the EOCA).

The facts leading to the arrest of the appellant and his prosecution was that on **04.09.2017**, without permission of the Director of Wildlife the appellant together with the above two others were found at WOGAKURYA area which is within the Serengeti National Park. They were also found in possession of two spears and one knife and they failed to satisfy the authorized officer that the weapons were for purposes other than hunting, killing or capturing wild animals. The appellant and those other fellows further were found in unlawful possession of five dried pieces a wildebeest which were Government Trophies valued at Tshs 1,430,000/=. The charge was read to the accused persons but they denied participating in commission of any of the offences charged. It appears from the record that from 05.04.2018 the said **NSONGO MAGAIGWA MWITA** and **OBOGO OBOGO NYANDOTO** jumped bail and do not seem to have been apprehended and brought back to justice despite the warrant of arrest issued on 05.04.2018.

The case proceeded in the presence of the appellant and on 18.01.2019 all the three accused persons were found guilty and convicted on two counts of entry into the National Park and unlawful possession of government trophies and they were sentenced to 1 year imprisonment or pay fine of Tshs 20,000/= in respect of the illegal entry in the National Park and 20 years

imprisonment for unlawful possession of government trophies. **NSONGO MAGAIGWA MWITA** and **OBOGO OBOGO NYANDOTO** were sentenced *in absentia*.

The appellant was aggrieved by both the conviction and sentence and therefore he filed this appeal raising a total of 6 grounds of appeal to challenge the judgment of the district court.

This appeal was heard in the absence of the appellant after seeking his approval following the corona virus outbreak worldwide. **Mr. Frank Nchanila** appeared for the Republic and submitted on all grounds raised. Ground No. 6 was that the prosecution did not prove the case beyond reasonable doubt against him. It is this ground that I will start with for reasons that will be abundantly clear as we go. Mr. Nchanila moved the court to dismiss that ground and the whole appeal because the case was credibly proved by the two prosecution witnesses who were called.

In this case, I have reviewed whole documentation of the trial court from the charge sheet to the evidence and I have too considered submissions of Mr. Nchanila who appeared for the republic. According to the charge sheet the offences were all committed on **04.09.2017** but the evidence as presented before the trial court by both **PW1 NJONGA MARKO WILLIAM** and **PW2 MZEE NDAKAMA** who testified for the prosecution stated that the offences were all committed on **04.10.2017**. In other words, whereas the charge contained offences committed on

04.09.2017, the witnesses who came to support it stated that the offences they had come to give testimony on were committed on 04.10.2017.

If that happens, the legal position was put plain and clear in **CRIMINAL APPEAL NO 24 OF 2015; ABEL MASIKITI VS REPUBLIC (UNREPORTED)**, where it was held that;

*"in a number of cases in the past, this court held that it is incumbent upon the Republic to lead evidence showing that the offence was committed on the date alleged in the charge sheet, which the accused was expected and required to answer. If there is any variance or uncertainty in the dates, then the charge must be amended in terms of section 234 of the CPA. If this is not done, the preferred charge will remain unproved, and the accused shall be entitled to an acquittal. Short of that a failure of justice will occur."*

That is the position and it is backed by an endless list of authorities by the Court of Appeal among which are **MOHAMED KANINGU VS REPUBLIC [1980] TLR 279, CRIMINAL APPEAL NO 482 OF 2016; JUSTINE MTELULE VS REPUBLIC (CA UNREPORTED), CRIMINAL APPEAL NO 274 OF 2009 MASASI MATHIAS VS REPUBLIC (CA UNREPORTED)** and **CRIMINAL APPEAL NO 327 OF 2016; VUMILIA PENDA MUSHI VS REPUBLIC (CA UNREPORTED)**. The reasoning behind the above decisions and this judgment is that where the prosecution witnesses prove an offence committed on a different date other than that in the charge, **first** the appellant is taken not to have understood the nature of the charge against him which must lead to a miscarriage of justice and **secondly**, the charge on record remains unproved against the accused person, for no witness would have said anything relating to what happened on that date. It is therefore not only lawful but also logical. That said it is

abundantly clear that the case was not proved beyond reasonable doubt against the appellant so much so that the 6<sup>th</sup> ground of appeal succeeds. As that ground has the effect of disposing of the whole appeal, there does not seem to be any economic advantage to discuss or resolve any other grounds of appeal.

To conclude this judgment, in view of the above revelation, this Court takes the position that the prosecution did not manage to prove the case beyond reasonable doubt against the appellant as required in criminal cases. Accordingly the appellant namely **GHATI MAGAIGWA KIHORE** is hereby acquitted of the offences charged in criminal case no 62 of 2017 with further orders that he be released immediately from prison and set to liberty unless he is held there for any other lawful cause.

DATED at MUSOMA this 8<sup>th</sup> May 2020



Z. N. Galeba  
**JUDGE**  
**08.05.2020**

**Court;** This judgment has been delivered today on 8<sup>th</sup> May 2020 in the absence of parties but with leave not to enter appearance in chambers following the corona virus outbreak globally and the medical advice to maintain social distance between individuals.

**Order;** Sufficient copies of this judgment be deposited at the Judgment Collection Desk for parties to collect their copies free of charge.



  
Z. N. Galeba  
**JUDGE**  
**08.05.2020**