

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**(Kigoma District Registry)**

**AT KIGOMA**

**APPELLATE JURISDICTION**

**(DC) CRIMINAL APPEAL NO. 64 OF 2019**

*(Consolidated with (DC) Criminal Appeal No. 265/2019)*

*(Original Criminal Case No. 277 of 2019 of the District Court of Kibondo District at Kibondo  
before Hon. F.Y. Mbelwa - RM)*

**RICHARD S/O MTASHA.....1<sup>ST</sup> APPELLANT**

**MSHIHIRI S/O MTASHA .....2<sup>ND</sup> APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**J U D G M E N T**

05/03/2020 & 06/03/2020

**I.C. MUGETA, J.**

The appellants were convicted with two offences. Unlawful entry in a game reserve and unlawful grazing in the game reserve. They have appealed to challenge the conviction and the consequent sentence. They are represented by Method Kabuguzi, learned advocate. On the hearing date Benedict Kivuma appeared for the Respondent. The learned State Attorney opposed the appeal. Mr. Kabuguzi combined the three grounds of appeal into one major complaint that the offence was not proved for want

of mens rea. Mr. Kivuma submitted that the offence of this nature are of strict liability and I agree with him.

The facts of the case are simple and straight forward. That appellants and their cows were found in a game reserve. Their defence is that they got therein to look for their cattle which broke the Kraal at night. They held with them a permit to search for the cattle from their village leadership and the Police. The issue for my determination is whether the offences were proved.

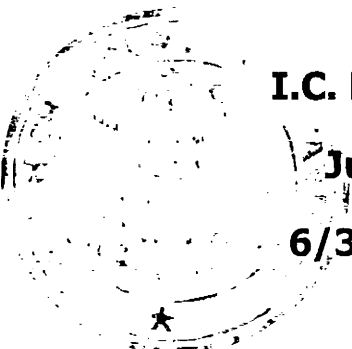
I start with the first count. According to the trial court records, there is no dispute that the appellants were found in the game reserve and that they went there to look for their stray cattle which went astray from the Kraal at night. Before they did that they obtained a permit (exhibit D1) to go searching for the missing cattle. The trial court appreciated that they had no other specific reason to enter the game reserved except for looking for their heads of cattle. The learned trial magistrate proceeded to convict them for unlawful entry because the offence is of strict liability nature. While I agree the offence is of strict liability, I hold a different view on the appellants' criminal responsibility. The evidence is clear that the cows broke the Kraal at night without the appellants' notice or knowledge. Therefore, the cows moved from the Kraal into the game reserve on their own. This is a different case from where the cattle strays inadvertently or for recklessness into a game reserve while grazing at day time. I am of the view that the appellants entered the game reserve on a just and lawful cause. Waking up in the morning to find your Kraal empty and heads of cattle missing is an emergency to the herdsman. The fact that the

appellants took trouble to inform the village leadership and the police about the intended search is an indicator of the precautions they took to vindicate their search for the cows. I understand exhibit D1 is not a substitute of an authority from the director of wildlife. It was, however, at least an authority to attend the emergency situation they had. I am of a considered view that in case of emergency, the rule on strict liability must be relaxed and the need to establish mens rea arises. In this case mens rea is lacking. I, therefore, hold that in the special circumstances of this case where mens rea was a prediquisite due to the emergency situation, the offence in the first count was not proved.

On the second count, there is also no dispute that the cattle were found in the game reserve. However, I am of the view that the cattle were, legally, not grazing. In reaching a decision, the learned trial magistrate referred to the case of **Enos Joseph @ Edward and Tata Bujiji V. R**, Criminal Appeal No. 30/2017, High Court, Bukoba (unreported) where the word grazing was defined as putting livestock out to feed. The learned trial magistrate got inspiration from this decision on the aspect that even if the cows are alone, the owners are responsible. This case was also cited to me by the learned State Attorney. Mr. Kabuguzi distinguished this case in that while in Enos's case the cattle had been taken there by cow boys who were arrested at a distance from them, in this case the cows broke the Kraal at night and therefore, owners cannot be said to have put or caused the cattle to get in the game reserve to graze. I agree with Mr. Kabuguzi. The word "*put*" in Enos's case imply intentional or reckless letting the cows enter the game reserve which is not the case here. It follows, therefore,

that even the second offence was not proved. The appellants did not graze the cows in the game reserve.

In the event, I allow the appeal. The conviction in both counts is quashed and sentences are set aside. The forfeiture order is also set aside. The sixty one (61) cattle to be returned back to the owner. The appellants paid fines to avoid jail sentence. The fine so paid should be paid back to the appellants.



*Mugeta*  
**I.C. Mugeta**  
**Judge**  
**6/3/2020**

**Court:** Judgment delivered in chambers before Method Kabuguzi, advocate for the appellants and Shaban Masanja, State Attorney, for the respondent.

**Sgd: I.C. Mugeta**

**Judge**

**6/3/2020**