IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF MUSOMA

AT MUSOMA

CRIMINAL APPEAL CASE No. 104 OF 2021

(Arising from the District Court of Serengeti at Mugumu in Economic Case No. 131 of 2020)

MATHIAS MAISERO @ MARWA
PETER MARWA @ GHATI ..... **APPELLANTS**

Versus

REPUBLIC ..... **RESPONDENT**

JUDGMENT

25.04.2022 & 29.04.2022

Mtulya, F. H., J.:

The **District Court of Serengeti at Mugumu** (the district court) in **Economic Case No. 131 of 2020** (the case) on 31st May 2021 had tried, convicted and sentenced Mr. Mathias Maisero @ Marwa and Mr. Peter Marwa @ Ghati (the appellants) for three offences, *viz*: first, unlawfully entry into the game reserve contrary to section 15 (1) & 2 of the **Wildlife Conservation Act** [Cap. 283 R.E. 2002] as amended by the Written Laws (Miscellaneous Amendment) Act No. 2 of 2016 (the Wildlife Act); second, unlawful possession of weapon in the game reserve against section 17 (1) & (2) of the Wildlife Act read together with section 57 (1) & 60 (2) and paragraph 14 of the First Schedule to the **Economic and Organized Crimes Control Act** [Cap. 200 R.E. 2019] (the Economic Crimes Act); and finally unlawful possession of government trophies against section 86 (1) & 2 (b) of the **Wildlife**

Act read together with section 57 (1) & 60 (2) and paragraph 14 of the First Schedule to the Economic Crimes Act.

The dual appellants were sentenced to serve two (2) years imprisonment for the first offence, two (2) years imprisonment for the second offence and twenty (20) years imprisonment for the third offence and all sentences were ordered to run concurrently.

The appellants were aggrieved by both the conviction and sentence and had preferred the present appeal disputing the judgment of the district court. In this court, the appellants filed a total of six (6) grounds of appeal. The grounds of appeal in brief show the following complaints: first, the district court did not consider defence evidences; second, district court denied the appellants the right to call witnesses; third, the procedure in recording the inventory form was not complied as the appellants were not present during the destruction of the alleged trophies; fourth, the prosecution failed to prove the offence of unlawful entry into the game reserve as there was no evidence of clear boundaries of the national park; fifth, right to be heard as the district court did not guide the appellant on legal procedures; and finally, the district court convicted the appellants based on wrong evidence of the prosecution side.

On 25th April 2022, the appeal was scheduled for hearing through teleconference attached in the Serengeti Prison and offices of the Director of Public Prosecutions, Musoma in Mara Region and the

appellants, being lay persons and had no legal representation, but prayed this court to consider their grounds of appeal as registered in the petition of appeal to find them innocent.

Upon perusing the record of this appeal and noting the directives of our superior court in the precedents of **Mohamed Juma @ Mpakama v. Republic**, Criminal Appeal No. 385 of 2017 and **Maduhu Nhandi @ Limbu v. Republic**, Criminal Appeal No. 419 of 2017, and being aware as an officer of this court, Ms. Agma Haule, learned State Attorney, who appeared for the Republic, did not protest the appeal in ground number three (3) and four (4) of the appeal.

In her brief submission in support of ground number three (3) and four (4) of the appeal, Ms. Haule briefly submitted that the law regulating preparation and recording of inventory form requires accused persons to be present and participate during destruction of the trophies as directed by the Court of Appeal in the case of **Mohamed Juma @ Mpakama v. Republic**, (supra). To her opinion, failure to abide with the directives of the Court of Appeal is a breach of the procedure and the evidence in inventory form becomes of less value and lacks merit. Ms. Haule submitted further that the evidence in inventory form is to be expunged from the record and once expunged, the third offence of unlawful possession of government trophies cannot be established.

According to Ms. Haule, once the third offence is declined, the Republic remains with two offences of unlawful entry and possession of weapons in the game reserve. However, in Ms. Haule's opinion, ground number four (4) displays a complaint on prove of actual place within the statutory boundaries of the game reserve where the appellants were arrested. Ms. Haule submitted that PW1 and PW3 did not state in the district court on where exactly they found the appellants hence could not have established the first offence of unlawfully entry into Grumet area of Ikorongo Game Reserve.

Finally, Ms. Agma submitted that the appellants were prosecuted for three offences and the last one was unlawful possession of weapons in the game reserve, which relates to the offence of unlawful entry into in the game reserve. In her opinion, Ms. Haule stated that since the offence of unlawful entry into the game reserve was not established, then the second offence on unlawful possession of weapons in game reserve dies natural death.

According to the record of the present appeal, the dual appellants were alleged and arraigned before the district court in the case on 12th November 2020 to reply three charges of unlawful entry into Mto Grumet area of Ikorongo Game Reserve, unlawful possession of the weapons one *panga* and one spear without permit at Mto Grumet area of Ikorongo Game Reserve and unlawful possession of government trophies one fresh head of buffalo, fresh neck of buffalo

and two forelimbs of buffalo. Both appellants pleaded not guilty to all the offences and consequently the Republic marshalled a total of four witnesses, namely: Masumbuko Matandula Mayenga (PW1), Wilbroad Vicent (PW2), Donald Boniface Justine (PW3) and G.4209 D/Cpl. Steven (PW4) to establish its case. The Four (4) witnesses produced facts and evidences in exhibit Certificate of Seizure (PE.1), one *panga* and one spear (PE.2), Trophies Valuation Certificate (PE.3) and Inventory of Claimed Property Certificate (PE.4).

Basically, the most reliable evidences were produced by PW1 and PW3 who claimed to have found and arrested the dual appellants with the said weapons and trophies in the game reserve on 6th November 2020 around 00:30 hours. The appellants on their part defended themselves without any other witnesses or legal representation. In their brief defence, the dual stated that on 6th November 2020 were cultivating shamba and park rangers showed up asking for casual labour for road maintenance. However, instead of casual labour, they found themselves at Pimbi Camp and later Mugumu Police Station in Serengeti District.

Following these evidences of both sides in the case, the district court was satisfied that the prosecution proved the case against both appellants beyond reasonable doubt hence had convicted the appellants to all three offences and sentenced them to serve two (2) years imprisonment for the first offence, two (2) years imprisonment

for the second offence and twenty (20) years imprisonment for the third offence and all sentences were ordered to run concurrently. The dual were aggrieved by both the conviction and sentence and filed six (6) grounds of appeal as shown in this appeal above. At the hearing of the appeal on 25th April 2022, Ms. Haule for the Republic supported ground three (3) and four (4) of the appeal on the procedure in recording the inventory form and prove of the offence of unlawful entry into the game reserve.

The only question for determination, in my considered opinion, which this court is invited to resolve is: whether the appellants were found and arrested at Mto Grumet area of Ikorongo Game Reserve in Serengeti District. The law regulating finding and arresting accused persons in statutory limits of game reserves is well articulated in the decision of our superior court in the precedent of **Cheyonga Samson v. Republic**, Criminal Appeal No. 510 of 2019, where their Lordships 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 Ikorongo Game Reserve*

without demonstrating the area of the arrest of the appellant to be within the statutory boundaries of the reserve.

This guideline of our superior court was invited again by the same court for consideration, early this year, in the decision of **Maduhu Nhandi @ Limbu v. Republic** (supra), where it was categorically stated that:

...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 National Parks Act, which provides the outline of the boundaries of the Serengeti National Park.

In the present appeal, the evidence registered by PW1 and PW3 in the district court did not produce certainty as to the exact place where the appellants were found and arrested. It was uncertain whether the alleged offence was committed inside the statutory limits of Mto Grumet area within Ikorongo Game Reserve in Serengeti District or elsewhere. In the circumstances, and considering failure of PW1 and PW3 to produce statutory limit where the appellants were found and arrested, I have no hesitation whatsoever, to state that their evidence raised reasonable doubt on whether the dual were arrested in the game reserve. The practice available in this court and Court of Appeal is that doubts are to be resolved in favour of accused

persons (see: **Maduhu Nhandi @ Limbu v. Republic** (supra); **Mohamed Said Matula v. Republic** [1995] TLR 3; and **Makuru Joseph @ Mobe v. Republic**, Criminal Appeal Case No. 146 0f 2021).

On the other hand there are doubts with regard to the Inventory Form (PE.4) and the complaint was well conceded by Ms. Haule. The present record is silent on participation of the appellants during disposal of the claimed government trophies, one fresh head of buffalo, fresh neck of buffalo and two forelimbs of buffalo. As of current, the provision in **paragraph 25 of the Police General Orders No. 229 (Investigation-Exhibits)**, which regulates the subject, has already received precedents in **Mohamed Juma Mpakama v. Republic** (supra) and **Maduhu Nhandi @ Limbu v. Republic** (supra). The mostly quoted text is found at page 23 of the decision in **Mohamed Juma Mpakama v. Republic** (supra), that:

> *...paragraph 25 [paragraph 25 of PGO No. 229 (Investigation-Exhibits)] envisages any nearest magistrate, who may issue an order to dispose of perishable exhibit. This paragraph 25 in addition emphasizes the mandatory right of an accused person (if he is in custody or out on police bail) to be present before the magistrate and be heard. In the instant appeal, the appellant was not taken before the primary court magistrate and be heard before the magistrate*

issued the disposal order (exhibit PE.3). While the police investigator, was fully entitled to seek the disposal order from the primary court magistrate, the resulting Inventory Form (exhibit PE.3) cannot be proved against the appellant because he was not given the opportunity to be heard by the primary court magistrate. In addition, no photographs of the perishable Government trophies were taken as directed by the PGO....Exhibit PE.3 cannot be relied on to prove that the appellant was found in unlawful possession of the Government trophies mentioned in the charge sheet.

From the above long quoted statement, it is obvious that exhibit PE.4 tendered by PW4 in the case cannot be relied to prove that the appellants were found in unlawful possession of the government trophies mentioned in the charge sheet. In the circumstances of this appeal and noting this court is inferior to the Court of Appeal, it has no options rather than to follow the course.

In the present appeal, facts and evidences show that the appellants were not found and arrested in the game reserve and that they were not in possession of the government trophies. In that case, determining the second offence of unlawful possession of weapons one *panga* and one spear becomes an academic exercise which this court will not endeavor to do in its precious time.

Finally, considering the foregoing deliberations and taking the evidences on record as a whole, I have no hesitation to state that the prosecution did not prove the case against the appellants beyond reasonable doubt in respect of all the offences that were registered in the district court as per requirement of the law in proving criminal cases (see: section 3 (2)(a) of the **Evidence Act** [Cap. 6 R.E. 2019] and precedents in **Said Hemed v. Republic** [1987] TLR 117; **Mohamed Matula v. Republic** [1995] TLR 3; and **Horombo Elikaria v. Republic**, Criminal Appeal No. 50 of 2005). Having said so, I allow the appeal, quash the conviction and set aside the sentence imposed to the appellants. I, ultimately, order the appellants be set free unless held for some other lawful cause.

It is so ordered.

Right of appeal explained.

F. H. Mtulya

Judge

29.04.2022

This judgment was delivered in chambers under the seal of this court in the presence of the learned State Attorney, Ms. Agma Haule and in the presence of the appellants, Mr. Mathias Maisero @ Marwa and Mr. Peter Marwa @ Ghati through teleconference placed at Serengeti Prison Mara Region and in the offices of the Director of Public Prosecutions, Musoma in Mara Region.

F. Moshi

Deputy Registrar

29.04.2022