

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF MUSOMA

AT MUSOMA

CRIMINAL APPEAL CASE No. 134 OF 2021

(Arising from the District Court of Serengeti at Mugumu in Economic Case No. 102 of 2020)

MAYONGERA MAYUNGA @ MAYONGERA APPELLANT

Versus

REPUBLIC RESPONDENT

JUDGMENT

16.05.2022 & 20.05.2022

Mtulya, J.:

Two (2) issues which resolve the present appeal were raised and heavily contested in this court. The issues enjoyed good five (5) hours of this court. It was a contest between Mr. Cosmas Tuthuru supported by Mr. Innocent Kisigiro, learned counsels, who appeared for Mr. Mayongera Mayunga @ Mayongera (the appellant) and Mr. Tawabu Yahya Issa, learned State Attorney, for the Republic.

The two issues were, namely: first, whether the appellant was arrested within the boundaries of Ikorongo Game Reserve to validate the first offence of unlawful entry into the game; and second, whether the appellant was given the right to be heard during the destruction of the claimed government trophies which substantiates the third offence of unlawful possession of

Government trophies. In order to determine the two cited issues the two contesting parties produced similar materials from the record of the appeal, but contrasted on interpretation of laws regulating the materials.

The record of appeal shows that on 4th August 2021, the appellant was convicted by the **District Court of Serengeti at Mugumu** (the district court) in **Economic Case No. 102 of 2020** (the case) for the three offences, namely: first, unlawful entry into the game reserve contrary to section 15 (1) & (2) of the Wildlife Conservation Act, No. 5 of 2009 as amended by the **Written Laws (Miscellaneous Amendment) Act No. 2 of 2017** (the Wildlife Act); second, unlawful possession of weapons in the game reserve contrary 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 (c) (iii) 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 appellant was sentenced to serve imprisonment for the terms of one year for the first offence, one year for the second offence and twenty years for the third offence. Both the conviction

and sentence aggrieved the appellant hence hired the legal services of Mr. Tuthuru and Mr. Kisigiro to file four (4) grounds of appeal in protesting the decision of the district court in the case. However, reading the four (4) grounds of appeal, two (2) issues were displaying general complaint on prove of the case beyond reasonable doubt, which did not take much time of this court as they depended on the other two remaining specific grounds, *viz*: first, complaint on where exactly the appellant was found and arrested; and second, the right to be heard during destruction of the trophies & admission of inventory form (PE.4).

It was Mr. Tuthuru who clicked the start button of proceedings in the present appeal contending that the appellant was arrested at Park Nyigoti near the game reserve washing his clothes and prosecution witnesses, Mr. Gidion Timan (PW1) and Mr. Gaston Mtaki (PW2) failed to produce evidence in the district court to show the precise point where the appellant was arrested to establish that he was grabbed within the boundaries of the Ikorongo Game Reserve as per requirement of the law in the First Schedule to the **Wildlife Conservation (Ikorongo and Grumeti Game Reserves) Declaration Order, GN. No. 214 of 1994** (the Order).

Mr. Tuthuru submitted further that the evidences of PW1 and PW2 failed even to show geographical positioning system (GPS) as

to where exactly the appellant was arrested hence the prosecution case lacked concrete evidence to prove the offence of unlawful entry into the game reserve.

In order to bolster his argument with the support of the Court of Appeal decisions, Mr. Tuthuru cited the precedents in **William Kilunga v. Republic**, Criminal Appeal No. 447 and **Mosi Chacha @ Iranga v. Republic**, Criminal Appeal No. 508 of 2019, contending that absence of clear boundaries showing where the appellant was apprehended faults the prosecution case. On the inventory form (PE.4) and one panga & six (6) trapping wires (PE.1), Mr. Tuthuru contended that PE.1 was admitted and considered without abiding with the law regulating admission of exhibits enacted in section 38 (3) of the **Criminal Procedure Act** [Cap. 20 R.E 2019] (the Act), section 22 (3) of the **Economic Crimes Act**, Police Form No. 145 drafted from Directive 31 of Order 229 of the **Police General Orders** (PGO), and precedents in **Malumbo v. The Director of Public Prosecutions** [2011] 1 EA 280 & **Kadina Said Kimaro v. Republic**, Criminal Appeal No. 301 of 2017.

Finally, Mr. Tuthuru prayed the exhibits in PE.1 be expunged from the record as breached the cited laws. With regard to PE.4, Mr. Tuthuru submitted that PE.4 was admitted and considered without following the law regulating consultations and participation of

accused persons. In substantiating the complaint, Mr. Tuthuru stated that during destruction or disposing of trophies, accused persons must be present and participate in the process, including asking questions on the subject matter.

In supporting his argument, Mr. Tuthuru cited the decisions of the Court of Appeal in **Mosi Chacha @ Iranga v. Republic** (supra) **Mohamed Juma @ Mpakama v. Republic**, Criminal Appeal No. 385 of 2017, which rendered down principles regulating destruction of trophies and participation of accused persons in economic crimes cases. In his opinion, the prosecution witness G.5805 D/Cpl. Christopher prepared PE. 4 in the case without participating the appellant hence breached the law and PE.4 must be expunged from the record for want of proper application of the law in cited precedents of the Court of Appeal.

The submission was received and supported by Mr. Kisigiro, who added two issues in Mr. Tuthuru's submissions. In his submission, Mr. Kisigiro contended that the charge sheet against the appellant is not specific as to where the appellant was arrested since Ikorongo Game Reserve is huge and River Ikorongo stretches in a long distances across villages. On the second issue, Mr. Kisigiro submitted that the proceedings in the district court does not reflect conduct and proceedings of destruction of the trophies and

participation of the appellant. In his opinion, the absence of the proceedings violated the enactment of section 101 of the **Wildlife Act** and precedents in **Masagali Mębacha @ Mazanzu v. Republic**, Criminal Appeal No. 158 of 2020 and **Peter Matoroke @ Rante v. Republic**, Criminal Appeal No. 149 of 2020, which cited the authority of **Mohamed Juma @ Mpakama v. Republic** (supra).

Replying the submissions of Mr. Tuthuru and Mr. Kisigiro, Mr. Tawabu stated that the evidence registered by PW1 and PW2 in the district court showed that the appellant was arrested within the boundaries of Ikorongo Game Reserve as PW1, PW2 and other park rangers were patrolling in the game and found the appellant with the weapons and trophies.

In his opinion, Mr. Tawabu, contended that the appellant was arrested by game rangers and not by police or normal citizens and it is impossible to claim that he was arrested outside the authority of the game rangers. Mr. Tawabu submitted further the science of GPS cannot be invited in present case as: first, that is the secondary evidence; second, not part of the enactment of the law regulating boundaries of game reserves or economic crimes; third, science in GPS cannot eradicate the fact that the appellant committed the offence in the game reserve and finally, the testimonies of witness PW1 and PW2 were trusted in the district court and there is no good

reasons why this court should fault their evidence. In order to bolster his argument, Mr. Tawabu cited the authority in **Goodluck Kyando v. Republic** [2006] TLR 363 contending that every witness must be trusted unless a court thinks there are good reasons to disbelieve him.

With evidences registered in the case from PE.1 to PE.4 and appellant's complaints, Mr. Tawabu contended that: section 38 (3) of the Act is not applicable in the present case as it regulates police officers, not game rangers who are regulated by section 106 of the **Wildlife Act** and in any case, the appellant did not cross examine PW1 & PW2 or protested admission of the exhibits PE.1 to PE.4 in the district court and had raised the issue in the appeal stage as an afterthought. Following the arguments, of Mr. Tawabu stated that the exhibits cannot be expunged from the record as they were admitted in abiding with the law regulating admission of exhibits.

In replying submission registered by Mr. Kisigiro, Mr. Tawabu argued that the drafting of charge sheet is regulated by section 135 of the Act and the provision was not breached in the present case, and that even if it was not complied to the standard required by Mr. Kisigiro, witnesses PW1 and PW2 have stated all necessary facts to constitute a case against the appellant, and that there is no any materials were registered in the present appeal to show any injustice

was caused to the appellant for want of specific area in the charge sheet. With regard to the proceedings during the destruction of the trophies in the record of the district court, Mr. Tawabu contended that section 101 of the Wildlife Act was amended by section 37 of the **Written Laws (Miscellaneous Amendment) Act No. 2 of 2017** (the Amending Act), which require proof of destruction of trophies in inventory form (PE.4) and not display of destruction proceedings during trial of the case.

With cited precedents regulating right to be heard in economic crimes cases, and specifically participation of accused persons during destruction of trophies, Mr. Tawabu contended that the cited precedents interpreted the PGO in paragraph 25 before the amendment in section 101 of the Wildlife Act in 2017. In his opinion, the present case may be distinguished from the cited precedents as the offence in the present case was committed in September 2020.

In brief rejoinder, Mr. Tuthuru contended that the issue is not reliability and credibility of witnesses, but evidence which display specific location where the appellant was arrested. In his opinion, if it is the question of reliability and belief on witnesses, all witnesses in the case enjoy equal rights as it was stated in the precedent of **Goodluck Kyando v. Republic** (supra) and all must be trusted including the appellant. As an officer of the court Mr. Tuthuru had

suggestion to this court and prayed this court to read the words of the Court of Appeal drafted at page 14 in the precedent of **Mosi Chacha @ Iranga v. Republic** (supra) with regard to evaluation of evidences registered in cases. Mr. Tuthuru contended that in the present case no statutory boundaries were cited and the appellant was not consulted during the destruction of the trophies as per requirement of the cited precedents of the Court of Appeal. In his opinion, PW1 and PW2 cannot be trusted as the produced in the district court narrations of chronological events instead of materials which would have established the prosecution case.

Mr. Tuthuru argued further that section 22 (3) of the **Economic Crimes Act** and PGO regulate seizure and destruction of fast decaying cargos, regardless of the type of policing. In his interpretation, Mr. Tuthuru, thinks that section 106 of the **Wildlife Act** gives powers to the game rangers in substantive right, but when it comes to responsibility in procedures, section 38 (3) of the Act and 22 (3) of the **Economic Crime Act** must be followed. In his conclusion Mr. Tuthuru prayed this court to sit into the shoes of the district court and peruse the record accordingly as it is the first appellate court to see whether there was fair trial in the district court.

In support of the move of Mr. Tuthuru, Mr. Kisigiro argued that PW1 and PW2 were supposed to go extra miles in explaining the geographical boundaries limiting the game reserve and testify with certainty as to where exactly they arrested the appellant. In his opinion, the provisions enacted in the Order have already received precedents of this court and Court of Appeal hence this court is bound to follow without reservations.

In bolstering his argument, Mr. Kisigiro submitted that page 14 in the decision of **William Kilunga v. Republic**, (supra) states it all with regard to geographical boundaries in national parks. With PE.4 and the right to be heard, Mr. Kisigiro contended that the record is silent on participation of the appellant during the destruction of the claimed trophies hence the validity of PE.1 must be questioned by this court. On failure to cross-examine prosecution witnesses on important matters or protest admission of the exhibits by the appellant, Mr. Kisigiro contended that the law regulating admission of exhibit PE.4 must be complied regardless the appellant protested or not, as that is the law and must be complied to avoid miscarriage of justice to the parties in criminal disputes.

Regarding the amendment in section 101 of the Wildlife Act, Mr. Kisigiro contended that the amendment was effected in 2017 whereas the precedents in **Mosi Chacha @ Iranga v. Republic**

(supra), **Masagali Mebacha @ Mazanzu v. Republic** (supra) and **Peter Matoroke @ Rante v. Republic** (supra) were decided in 2021 after the amendment of the law and for the events which occurred after 2017.

On my part, I borrowed the advice from the officer of this court, learned counsel Mr. Tuthuru, to peruse and scan the record to learn whether there was fair trial between the contesting parties in the case. I went to our district court of Serengeti at Magumu to the text which initiated the case in the court. I found the initial charge against the appellant was pressed by the Republic on 17th September 2020 and on 25th November 2020, the initial charge was substituted by another charge. The second charge which the appellant replied, shows that the appellant was arrested on 16th September 2020 at **Mto Manchira area into Ikorongo Game Reserve** within Serengeti District in Mara Region in possession of one (1) panga and six (6) trapping wire and Government trophies, namely: two fresh fore limbs, two hind limbs, one head and fresh ribs meat all of wildebeest, without permission of the Director of Wildlife.

The inventory form admitted in exhibit PE.4 on the other hand shows that the appellant was arrested at **Nyigoti National Park in Serengeti District** and no questions were asked to show that the

appellant participated in the understanding and destruction of the claimed trophies. During the proceedings before the district court, PW1 and PW2 testified that on 16th September 2020, they had arrested the appellant at Mto Manchira area within Ikorongo Grumet Game Reserve during their patrol. In its conclusion, the district court at the last page, but two, stated that: I find the accused person guilty of an offence charged and hereby convict them for unlawfully entre into the game Reserve contrary to section 15 (1) and (2) of the Wildlife Act, No. 5 of 2009.

Following the discrepancies, and considering learned minds of the parties were contesting on where exactly the appellant was arrested in the first point of protest and right to be heard in PE.4 on the second point, and registered precedents with distinct interpretations, this court had invited the learned minds to assist this court in resolving the issues, apart from consideration of the cited enactments in law and precedents. The invitation of the learned minds was on the right to be heard enacted under article 13 (6) (a) of the **Constitution of the United Republic of Tanzania** [Cap. 2 R.E. 2002] and well celebrated in precedents of the Court of Appeal in **Mbeya-Rukwa Auto Parts & Transport Limited v. Jestina George Mwakyoma** [2003] TLR 251 and **Judge In Charge, High Court at**

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Mr. Tawabu was the first in taking the floor of this court to cherish the right to be heard and contended that the cited discrepancies are minor and did not occasion miscarriage of justice and cured under section 388 (1) of the Act. In his opinion, the discrepancies did not go to the root of the matter that the appellant committed the offence. With differences in interpretation of the Court of Appeal decisions, Mr. Tawabu submitted that he registered laws in terms of statutes regulating the disputes and must prevail than the laws passed by the courts in terms of precedents.

On his part, Mr. Tuthuru submitted the charge displays the appellant was arrested at **Nyigoti National Park in Serengeti District** which is within the village authority and outside the protected area. In his opinion, the charge sheet was supposed to be amended to reflect the reality on what exactly transpired so that the appellant could have properly defended his case and without amendment to the charge sheet, the offence remain unproved.

According to Mr. Tuthuru, section 388 (1) of the Act cannot be invited in a situation where the offence was alleged to have been committed outside the jurisdiction of the Game Reserve hence denied the appellant the right to be heard which goes to the fair

trial. With the confusion on enactment of section 101 of the Wildlife Act and amendment brought by section 37 in the Wildlife Act in 2017 and the cited precedents of the Court of Appeal, Mr. Tuthuru argued that the provisions have already received interpretation of the Court of Appeal, and this court cannot depart, even it sees right to do so.

Mr. Kisigiro, on his part, insisted that the dispute is on proper and specific boundaries of the game reserve which caused all the disputes as the appellant was charged with unknown offences. In his opinion, the law that brought amendment in section 101 of the Wildlife Act did not abolish the right to be heard to accused persons in destruction of trophies or removed the requirement of statutory boundaries in game reserves.

After registration of materials of the learned counsels, this court revisited again the proceedings to see the mandate of the inventory form in exhibit PE. 4. It was unfortunate that the exhibit PE. 4 was silent on where it derived its mandate, at least to settle invitation and use of the proper law, as to whether it is the Act, PGO, Economic Crimes Act or the Wildlife Act. Following the silence, I asked myself the crucial question as to whether the appellant was afforded a fair trial. From the record, it is obvious that there are contradictions of materials: first, between the charge sheet and PE.4; and second, the enactment of the Parliament in section 37 of

the Amending Act and precedents of the Court of Appeal in the precedents in **William Kilunga v. Republic** (supra), **Mosi Chacha @ Iranga v. Republic** (supra), **Mohamed Juma @ Mpakama v. Republic** (supra), **Masagali Mebacha @ Mazanzu v. Republic** (supra) and **Peter Matoroke @ Rante v. Republic** (supra).

I will start with the first issue, on whether the contradictions of materials in the charge sheet and PE.4 is a minor. I am fully aware that minor discrepancies, which do not go to the root of the matter, cannot vitiate proceedings or amount to unfair hearing or cause miscarriage of justice. That is the practice of this court and the Court of Appeal and has been celebrated in a bundle of precedents (see: **Onesmo Kashonele & Others v. Republic**, Criminal Appeal No. 225 of 2012; **Abdallah Rajabu Waziri v. Republic**, Criminal Appeal No. 116 of 2004; and **Yohanis Msigwa v. Republic** [1990] TLR 148).

However, in a situation where the charge sheet reflect distinct geographical area with that displayed in the exhibit PE.4, that cannot be said as minor and cured under section 388 (1) of the Act or the cited bunch of precedents. It impossible for an accused person to be summoned to reply a charge of the offence committed at **Mto Manchira area into Ikorongo Game Reserve** within Serengeti District in Mara Region whereas the evidence in PE.4 to display

Nyigoti National Park in Serengeti District which is within the village authority and outside the protected area of the game reserve.

At any rate, that has denied the appellant to prepare his defence and denied him the right to cherish fair trial and amount to the violation of the right to be heard, which is not only a human right issue, but also a constitutional matter. The trial in the district court was unfair and prejudiced the appellant. Having said so, and considering the evidence in PE. 4 was admitted contrary to the law, I hereby expunge it from the record.

I understand the contests on the interpretation of the law regulating the right to be heard in destruction of Government trophies and appreciation of statutory boundaries surrounding the game reserves and national parks in one hand and the cited precedents of this court and the Court of Appeal on the two subjects on the other. First of all, I will disregard the precedents of this court in **Masagali Mebacha @ Mazanzu v. Republic** (supra) and **Peter Matoroke @ Rante v. Republic** (supra) for obvious reasons that the decisions emanated in this court and this court retains the right to depart when it is right to do so or if there are good reasons to overrule its own previous decisions.

The Court of Appeal, on 27th February 2019, had produced details directives to all courts below it, including this court, in the

precedent of **Mohamed Juma Mpakama v. Republic** (supra), on paragraph 25 of the PGO, that:

...the 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.

However, the directives were issued from the first count in the case related to the offence of unlawful possession of Government trophies one warthog, seven rock hyrax, two mongoose and one African hare contrary to the Wildlife Act read together with Economic Crimes Act and the appellant in the case was found guilty and sentenced twenty (20) years imprisonment by the district court and was confirmed by this court. However, the offence was allegedly to have been committed on 5th September 2014 and the appellant in the case arraigned in the district court before enactment of the Amending Act in 2017. The decision is also obvious cannot be considered in the present appeal.

Two (2) years later, the decision in **William Kilunga v. Republic** (supra) was rendered down and the Court at page 14 stated that: *the absence of clear boundaries between the National Parks and where the appellant was found, [then] it is not certain if the appellant was apprehended in the National Parks.* The court on the same page added further that:

...the omission to tread out the evaluation and inventory forms to the appellant, means he was convicted on the basis of documentary evidence, [which] he was not aware of though in court.

This directive was delivered on 24th August 2021 from an offence committed on 24th February 2016. However, after the enactment of the Amending Act in section 37, the commonly cited decision of the Court of Appeal in **Mosi Chacha @ Iranga v. Republic** (supra) was delivered on 22nd October 2021 by the Court sitting in Musoma Registry determining an allegation of unlawful entry into Ikorongo Game Reserve contrary to the Wildlife Act and unlawful possession of the Government trophies, namely four (4) pieces of dried zebra meat. It was alleged that the offences were committed on 11th March 2018. After full hearing of the appeal, the Court of Appeal at page 16 stated that:

*It will not suffice, for the prosecution witnesses to merely allege that **the scouts stopped the appellants at Mto Rubanda area of Ikorongo Game Reserve**. The trial court must evaluate competing evidence and satisfied that the Mto Rubanda area is within the Ikorongo Game Reserve...this Court has always taken a grave view of the failure to consider the accused person's defence and regards it as making a resulting conviction unsafe... in **Ally Patrick Sanga v. Republic**, Criminal Appeal No. 341 of 2017, we reiterated the duty of courts to objectively*

evaluate defence case. Failure of that makes the conviction unsafe.

I am fully aware that in the directives, the Court of Appeal did not invite or determine the new enactment of section 37 of the Amending Act on reflection of the proceedings during the destruction of the trophies, but had ample time to invite and discuss the decision of **Mohamed Juma Mpakama v. Republic** (supra) at page 12 of the judgment and did not distinguish it with any other precedent or the case at their hands.

The Court also invited and interpreted the Order and section 15 (1) of the Wildlife Act and precedent in **Andrew Lonjine v. Republic**, Criminal Appeal No. 50 of 2019 on the need of proof beyond reasonable doubt and importance of proving all essential elements constituting offences of unlawful entry into the game reserve and illegal possession of government trophies. Following that display of our superior court, and noting the decision in **Mohamed Juma Mpakama v. Republic** (supra) was cited without any reservation, its directives are still intact until when the Court of Appeal distinguish or depart from the directives.

In the present appeal, witnesses PW1 and PW2 merely stated that they saw and managed to arrest the appellant at *Mto Manchira area of Ikorongo Grumet Game Reserve*. The district court then

declined to evaluate the competing evidence and satisfied itself on *Mto Manchira area of Ikorongo Grumet Game Reserve*. It is unfortunate that even the evidence in Exhibit PE. 4 contradicts the charge sheet and PE.2 with regard to actual geographical position where the appellant was arrested, and I stated in this case that alone breached the right to be heard and prejudiced the appellant.

As the prosecution witnesses in the precedent of **Mosi Chacha @ Iranga v. Republic** (supra) stated similar general statements as the statements found in witness PW1 and PW2 in the present case, this court thinks that the district court had declined to evaluate the competing evidence and failure to that makes the conviction unsafe. In the present appeal I will follow the course taken by the Court of Appeal in the precedent of **Mosi Chacha @ Iranga v. Republic** (supra) without any reservation whatsoever.

In the final analysis, I hold that appellant was not arrested within the boundaries of Ikorongo Game Reserve to validate the first offence of unlawful entry into the game and that he did not cherish the right to be heard in the whole saga of the case to establish that he was found with the claimed government trophies to validate the third offence of unlawful possession of Government trophies. Noting the second offence relates to the unlawful possession of weapons

panga and wires, and aware the first and third offences were not established, I do not think if the second offence would stand.

Regarding the foregoing deliberations and noting the law in section 3 (2)(a) of the Evidence Act [Cap. 6 R.E. 2019] and precedent in **Said Hemed v. Republic** [1987] TLR 117, on the need of proof beyond reasonable doubt in criminal cases, I find merit in this appeal and accordingly allow it. I therefore quash the conviction and set aside the sentences meted to the appellant. I further order the appellant be released forthwith from prison unless he is held for some other lawful cause.

It is so ordered.

Right of appeal explained.



A handwritten signature in blue ink, appearing to read "F.H. Mtulya", with a long horizontal flourish extending to the right.

F.H. Mtulya

Judge

20.05.2022

This judgment was delivered in chambers under the seal of this court in the presence of the learned State Attorney, Mr. Nimrod Byamungu and in the presence of the appellant, Mr. Mayongera Mayunga @ Mayongera and his learned counsel, Mr. Cosmas Tuthuru via teleconference placed at this court, Mugumu Prison in Serengeti District of Mara Region and in the offices of the Director of Public Prosecutions, Musoma in Mara Region.



F.H. Mtulya

Judge

20.05.2022