IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF MUSOMA

AT MUSOMA

CRIMINAL APPEAL CASE No. 159 OF 2021

(Arising from the District Court of Serengeti at Mugumu in Economic Case No. 75 of 2018)

MAHENDE GETOCHO @ MAHENDA ..... **APPELLANT**

Versus

REPUBLIC ..... **RESPONDENT**

JUDGMENT

30.05.2022 & 06.06.2022

Mtulya, J.:

Our superior court in judicial hierarchy, the Court of Appeal, on 27th February 2019, had produced a detailed directive with regard to the interpretation of paragraph 25 (Investigation-Exhibits) of the **Police General Orders** (PGO) in the precedent of **Mohamed Juma @ Mpakama v. Republic**, Criminal Appeal No. 385 of 2017. The Court stated that:

> *...paragraph 25 envisages any nearest magistrate, who may issue an order to dispose of perishable exhibit. The paragraph, 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.*

(Emphasis supplied).

The directive was 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 Conservation Act, No. 5 of 2009 (the Wildlife Act) read together with the **Economic and Organized Crimes Control Act** [Cap. 200 R.E. 2019] (the Economic Crimes Act). After a full hearing of the case at the district court, the appellant was found guilty and sentenced to serve twenty (20) years imprisonment, which was confirmed by this court.

However, the Court of Appeal did not support the move hence produced the cited directive and finally quashed the decisions of

both courts below. According to the common law legal traditions, which this State follows, the precedent binds the Court of Appeal itself and all other courts below it in judicial hierarchy, including this court. Two (2) years on the course, that is on 24th August 2021 the Court rendered down the precedent in **William Kilunga v. Republic**, Criminal Appeal No. 447, and supported the directive and at page 14 added another requirement of*: the clear boundaries between the National Parks and where the accused persons are arrested for the need of certainty as where exactly accused persons are apprehended in the National Parks*. The court on the same page added further that:

> *...the omission to read 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.*

Sometimes in 2017, the Parliament in Dodoma amended the Wildlife Act via the **Written Laws (Miscellaneous Amendment) Act No. 2 of 2017** (the Amending Act). This was followed by the precedent in **Mosi Chacha @ Iranga v. Republic**, Criminal Appeal No. 508 of 2019 decided 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.*
>
> (Emphasis supplied).

I am fully aware that in the directives, the Court of Appeal did not cite or determine the Amending Act, but invited the precedent in **Mohamed Juma Mpakama v. Republic** (supra) at page 12 of its judgment and supported the directive without any reservations. For the sake of certainty and predictability of the precedents emanated from our superior court, several other precedents of the court supported the directives: first, right to be present and heard before

magistrates issue disposal order; and second, the prosecution to prove accused persons are arrested in the outlined boundaries of national parks or game reserves (see: **Cheyonga Samson v. Republic**, Criminal Appeal No. 510 of 2019 and **Maduhu Nhandi @ Limbu v. Republic**, Criminal Appeal No. 419 of 2017).

On the same course, the Court of Appeal was invited on 25th December last year to determine an appeal brought before it in the precedent of **Willy Kitinyi @ Marwa v. Republic**, Criminal Appeal No. 511 of 2019 to say a word or two with regard to the offence of unlawful entry into national parks contrary to section 21 (1) (a) & (2) of the **National Parks Act** [Cap. 282 R.E. 2002] as amended by the **Written Laws (Miscellaneous Amendment) Act No. 11 of 2003** (the Act). The Court did not mince words:

> *We instantly agree with Mr. Temba that in relation to the first count, the appellant was charged with and convicted on a non-existing offence, because section 21 (1) (a) (2) of the NPA does not create the offence of unlawful entry into a game reserve. We need not mince words, in our view, because this is not one of those defects that can be cured by section 388 of the CPA. Very recently in* ***Dogo Marwa @ Sigana v. Republic****, Criminal Appeal No. 512 of 2019, we faced a similar situation and held that: it is now apparent that the amendment brought under Act*

No. 11 of 2003 deleted the actus reus (illegal entry or illegal remaining in a national park) and got confusion in section 21 (1) of the NPA.

Following this statement of our superior court, it is obvious that the offence of unlawful entry into national parks contrary to section 21 (1) (a) & (2) of the Act cannot be prosecuted in our courts, unless the laws is amended to enact the *actus reus* of the offence. The directives of the Court of Appeal were well received in a bunch of decisions of this court and accordingly followed them (see: **Mathias Maisero @ Marwa & Another v. Republic**, Criminal Appeal No. 104 of 2021; **Jona Mosi @ Masoya v. Republic**, Criminal Appeal Case No. 144 of 2021; **Mayongera Mayunga @ Mayongera v. Republic**, Criminal Appeal Case No. 134 of 2021; **Masagali Mebacha @ Mazanzu v. Republic**, Criminal Appeal No. 158 of 2020; and **Peter Matoroke @ Rante v. Republic**, Criminal Appeal No. 149 of 2020).

In the present appeal, the appellant was arraigned in the **District Court of Serengeti at Mugumu** (the district court) in **Economic Case No. 75 of 2018** (the case) to reply a charge of three (4) counts, namely: first, unlawfully entry in the national park contrary to section 21 (1) (a) & 2 and 29 (1) of the **National Parks Act** [Cap. 282 R.E. 2002] as amended by the **Written Laws (Miscellaneous Amendment) Act No. 11 of 2003** (the Act);

second, unlawful possession of weapons in the national park against section 24 (1) (b) & (2) of the Act; and two counts of unlawful possession of government trophy against section 86 (1) & 2 (c) (iii) of the **Wildlife Conservation Act**, No. 5 of 2009 read together with section 60 (2) and paragraph 14 of the Schedule to the **Economic and Organized Crimes Control Act** [Cap. 200 R.E. 2002], as amended by section 13 & 16 of the **Written Laws (Miscellaneous Amendment) Act No. 3 of 2016** (the Economic Crimes Act).

After a full hearing of the case, the district court found the appellant guilty of all four (4) counts and sentenced him to serve one (1) year imprisonment for the first offence, one (1) year imprisonment for the second offence; and twenty (20) years imprisonment for the third offence; and twenty (20) years imprisonment for the fourth offence and all sentences were ordered to run concurrently.

The appellant was aggrieved by both the conviction and sentence and had preferred the present appeal disputing the judgment of the district court in six (6) grounds of appeal. However, when the appeal was scheduled for hearing on 30th April 2022, the appellant prayed all reasons of appeal be considered by this court save for the last ground which he briefly submitted. In his last ground, the appellant complained on right to participate

and heard before the magistrate signed and issued the order and attachment of photographs of the perishable Government trophies. In his submission, the appellant, who is a lay person and appeared without legal representation, stated that he was not summoned to witness the magistrate during issuing the disposition order to cherish the right to be heard and no any photographs were attached in the charge sheet.

Replying the submission of the appellant, the Republic marshalled Ms. Agma Haule to interpret the evidence on record and argue the appeal. However, Ms. Haule was so gentle and conceded the appeal arguing that the appellant is complaining on the testimony of police officer numbered H. 3802 DC Yunus (PW4) and evidence in exhibit PE. 3, which was tendered by the same PW4. According to Ms. Haule, PW4 stated that he prepared the inventory form to the magistrate and during the proceedings in the district court it was admitted as exhibit PE.3. To Ms. Haule this is against the law regulating admission of exhibits originated from destruction of Government trophies.

In order to bolster her argument, she cited the authority in the precedent in **Mohamed Juma @ Mpakama v. Republic** (supra) stating that exhibit PE.3 be expunged from the record and once expunged the third and fourth counts cannot be established. Being aware of the amendment brought under Act No. 11 of 2003, which

deleted the *actus reus* in the offence of illegal entry or illegal remaining in a national park and the confusion brought in section 21 (1) and 29 of the Act, Ms. Haule submitted that the appellant was prosecuted for non-existing offence hence prayed this court to delete the first offence.

Regarding the second offence of unlawful possession of weapons in the national park, Ms. Haule contended that the prosecutions' witnesses number one and two, Mr. Stamius Mtalemwa (PW1) and Iddi Mohamed Kanjele (PW2) respectively, produced evidence in the district court showing they found the appellant in the national park, but did not demonstrate the boundaries of the park as required by the law in the precedent of **Maduhu Nhandi @ Limbu v. Republic** (supra). In her opinion, that is the position of the law and this court must abide with the law drawn from precedents of the Court of Appeal. Finally, Ms. Haule submitted that all four offences were not proved beyond reasonable doubt and let it to this court to peruse the proceeding of the district court in the case and determine the appeal according to the law.

The record in present appeal shows that on 21st of August 2019, PW1 and PW2 were summoned to appear in the district court to testify on where exactly they arrested the appellant within the Grumeti area of Serengeti National Park within Serengeti District in

Mara region. At page 25 of the proceedings conducted on the said date, PW1 testified that:

> *I remember on 03/08/2018 at about 15:00hours, we were on patrol with my fellow...at Mto Grumeti area inside Serengeti National Park...we saw one person walking therein...we surrounded and arrested him [the appellant].*

With regard to the evidence of PW2, the records shows at page 27 of the proceedings conducted on the same day that:

> *On 03/08/2018 at about 15:00hours, I was on patrol with my fellow officers...at Grumeti area inside Serengeti National Park. We saw a person walking therein and surrounded and arrested him.*

Whereas PW4 on his part testified that:

> *I remember on 04/08/2018 in the morning hours I was assigned case file No. MUG/IR/2618/2018 to investigate. I read the case file and revealed that the offence involved is unlawful possession of government trophies...I called the wildlife warden. He identified the government trophies.* ***I prepared the inventory form and presented before the magistrate for disposal.***
>
> (Emphasis supplied).

The inventory form, as from the record, was admitted as exhibit PE.3. From the available evidences on record, the district

court on 28th August 2019 satisfied itself that all four (4) offences were proved beyond reasonable doubts. However, the learned magistrate who sat in the case was unaware of the above cited laws and practice of this court and Court of Appeal on the issues, particularly the commonly cited paragraph of the precedent in **Mohamed Juma @ Mpakama v. Republic** (supra), which was determined before the decision of the district court.

Following the evidence on record with regard to testimonies of PW1 and PW2, which merely narrates that they arrested the appellant inside Grumeti area inside Serengeti National Park without further demonstrating the area of the arrest of the appellant to be within the statutory boundaries of the reserve, that alone will not place the appellant within the statutory limits of Serengeti National Park. It is unfortunate that even a close scrutiny of the evidence of PW1 and PW2, they display two distinct places. PW1 mentioned *Mto Grumeti area inside Serengeti National Park* whereas PW2 cited *Grumeti area inside Serengeti National Park.* In law, the areas are two distinct places (see: **Mayongera Mayunga @ Mayongera v. Republic** (supra). Courts of law and justice cannot render conviction in circumstances displayed in the present appeal.

The materials registered by PW4 with regard to exhibit PE.3 on the other hand are very unfortunate. The only evidence which proves the offence of unlawful possession of Government trophies

in the third and fourth count was ferried from PW4 to the learned magistrate without photographs and participation of the appellant contrary to the law in paragraph 25 of the PGO and directives of our superior court in the precedent of **Mohamed Juma @ Mpakama v. Republic** (supra). No wonder the appellant heavily relied and argued the sixth ground of appeal in reservation of other grounds to be determined by this court.

However, the facts and evidences as displayed from the record of this appeal, this court cannot be detained to determine all grounds of appeal. The reasons are obvious and straight forward that the record is plain that the three offences in second, third and fourth count were not established beyond reasonable doubt as per requirement of the law in 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. Similarly, the first offence does not exist in statutes hence cannot be relied to detain the appellant.

In my considered opinion, I think, this appeal was brought in this court with good reasons and accordingly allowed. I further quash the conviction and set aside the sentences meted to the

appellant. I order an immediate released of the appellant from prison custody, unless he is held for some other lawful cause.

It is so ordered.

Right of appeal explained.

F. H. Mtulya

Judge

06.06.2022

This judgment was delivered in chambers under the seal of this court in the presence of the learned State Attorney, Mr. Tawabu Yahya and in the presence of the appellant, Mr. Mahende Getocho @ Mahende through teleconference placed at Serengeti Prison in Mara Region and in the offices of the Director of Public Prosecutions, Musoma in Mara Region.

F. H. Mtulya

Judge

06.06.2022