THE UNITED REPUBLIC OF TANZANIA

(JUDICIARY)

THE HIGH COURT

(MUSOMA SUB REGISTRY)

AT MUSOMA

CRIMINAL APPEAL No. 22 OF 2022

(Arising the District Court of Serengeti at Mugumu in Economic Case No. 1 of 2021)

1. **WILSON CHACHA @ MAGARYA**
2. **SAMWEL MWENG'E @ KEMORE** ..... **APPELLANTS**
3. **JUMA GICHOGO @ ITEMBE**

Versus

THE REPUBLIC ..... **RESPONDENT**

JUDGMENT

06.03.2023 & 08.03.2023

Mtulya, J.:

There is a large number of pages in the precedents printed at the Court of Appeal (the Court) regulating arrest and participation of accused persons allegedly found in national parks and game reserves in Tanzania. During arrest of the accused persons, the Court requires arresting officers to identify exact location of arrest as per enacted boundaries of national parks or game reserve.

Regarding participation of accused persons, the Court directed that accused persons alleged to have been found with perishable Government trophies be brought before a magistrate and cherish the right to be heard before the magistrate issues a

disposition order. On identification of location where accused persons are arrested in national parks or game reserve which are statutorily established, the Court had produced a lengthy educational paragraph explaining the subject. In the precedent of **Maduhu Nhandi @ Limbu v. Republic**, Criminal Appeal No. 419 of 2017, the Court at page 18 and 19 of the judgment, observed that:

> *...considering the uncertainty of the testimonies of PW1 and PW2 concerning the exact place where the appellant and another were arrested within the boundaries of the Serengeti National Park as stipulated by the law,* ***we have no hesitation to state that the appellant defence raised reasonable doubt on whether he was arrested within the boundaries of SENAPA****. To this end,* ***the doubt had to be resolved in his favour by both the trial and first appellate courts.***
>
> (Emphasis supplied).

In the precedent of **Maduhu Nhandi @ Limbu v. Republic** (supra), the Court cited with approval the authority in **Chenyonga Samson Nyambare v. The Republic**, Criminal Appeal No. 510 of 2019, in which the prosecution did not explain *beyond reasonable doubt* if truly the area in which the appellant was found grazing

cattle was within Serengeti National Park. The Court after perusal of the record, stated that Ikorongo game reserve boundaries are statutorily defined hence *evidence on record must place the appellant inside statutory limits of the reserve*. On demonstration of the area of arrest and burden of proof, the Court observed that:

> *It will not suffice to shift the burden to the accused person, where PW1 and PW2 merely narrate the game scout arrested the appellant inside Ikorongo Game Reserve without* ***demonstrating the area of the arrest of the appellant to be within the statutory boundaries of that reserve.***
>
> (Emphasis supplied).

This course has also been cherished in a bunch of precedents of the Court and this court (see: **Mosi Chacha @ Iranga v. Republic**, Criminal Appeal No. 508 of 2019; **Michael Molenda @ Nyahegere & Another v. Republic**, Criminal Appeal Case No. 107 of 2021; and **Mwera Nyakengwena @ Mwita & Another v. Republic**, Criminal Appeal Case No. 32 of 2022; **Mahende Gitocho @ Mahenda v. Republic**, Criminal Appeal Case No. 159; and **Marwa Chacha @ Mwita v. Republic**, Criminal Appeal Case No. 93 of 2022.

On participation of the accused persons arrested in national parks and game reserves with perishable Government trophies and interpretation of paragraph 25 **(Investigation-Exhibits) of the**

Police General Orders (PGO), the Court, in the precedent of **Mohamed Juma @ Mpakama v. Republic**, Criminal Appeal No. 385 of 2017, had directed that:

> *...paragraph 25 envisages any nearest magistrate [who issues] an order to dispose of perishable exhibit...in addition* ***emphasizes the mandatory right of an accused person 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)....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 directives were followed in a bundle of decisions of the Court and this court, without any reservations (see: **William Kilunga v. Republic**, Criminal Appeal No. 447; **Michael Molenda @ Nyahegere & Another v. Republic** (supra); **Mwera Nyakengwena @ Mwita & Another v. Republic** (supra); and **Mahende Gitocho @ Mahenda v. Republic** (supra).

In the present appeal the appellants were complaining on three (3) issues, *viz*: first, the trial court relied on wrong evidence of PW3; second, the evidences of PW1, PW2 and PW5 were not corroborated and finally, the appellants did not cherish the right to be heard and no photographs were taken during disposition of the alleged trophies. The appeal was scheduled for hearing on 6th March 2023 and after registration of necessary materials by the appellants, learned State Attorneys, **Ms. Agma Haule** and **Mr. Felix Mshama**, conceded the appeal but on different grounds. According to Ms. Haule, there are discrepancies in the materials prepared in the charge sheet and those produced during the hearing of the matter.

In her opinion, as officer of the court, the appellants were charged with three offences, namely: first, unlawful entry into the National Park contrary to section 21 (1) & (2) (a) of the **National Park Act [Cap. 282 R.E. 2002]** as amended by Act No. 11 of 2003 read together with GN, No. 335 of 1968 (the National Park Act); second, unlawful possession of weapons with intent to commit an offence in the National Park contrary to section 103 of the **Wildlife Conservation Act, No. 5 of 2009** (the Wildlife Act) read together with sections 60 (2) & paragraph 14 of the First Schedule to the **Economic and Organised Crime Act [Cap. 200 R.E. 2019]** (the

Economic Crime Act); and unlawful possession of Government trophies contrary to section 86 (1) & (2) (c) (iii) of the Wildlife Conservation Act as amended by the **Written Laws (Misc. Amendment) Act, No. 2 of 2016** read together with sections 57 (1), 60 (2) & paragraph 14 of the First Schedule to the Economic Crime Act). However, according to Ms. Agma, the offence of unlawful entry into national park has a lot of uncertainties in its enactment and the remaining two offences cannot stand in the circumstances of the present case. With the second and third offences, Ms. Haule submitted that PW1 and PW2 testified before the **District Court of Serengeti at Mugumu** (the district court) in **Economic Case No. 1 of 2021** (the case) without descriptions of the area where the offence was committed and PW4 testified to have taken all the accused persons with their exhibit to the magistrate and ordered it to be destroyed.

To Ms. Haule, the record in the case displays a practice contrary to the directives of the Court as indicated in the precedents of **Maduhu Nhandi @ Limbu v. Republic** (supra) and **Mohamed Juma @ Mpakama v. Republic** (supra). Finally, Ms. Haule contended that there are faults on the record that make both the proceedings and judgment a nullity. Replying the

submission of Ms. Haule, the appellants had nothing to add rather than praying for the court to release them from prison custody.

I have glanced the record of the instant appeal and grasped the submission of Ms. Haule. The Record shows that two arresting officers, **Mr. Leonatus Mabina** and **Mr. Charles Chacha** were summoned to testify in the case as PW1 and PW2 as reflected at page 21 and 22 of the proceedings, respectively. PW1 testified to have spotted and arrested three persons at Mto Mara area within Serengeti National Park in Serengeti District, Mara Region whereas PW2 testified to have arrested three person in bushes. PW1 had remained silent on Serengeti National Park statutory boundaries where they found the accused persons whereas PW2 remained silent on the location of the bushes and statutory boundaries of the national park where he arrested the accused persons.

This is obvious breach of the directives of the Court of Appeal in the indicated precedent of **Maduhu Nhandi @ Limbu v. Republic** (supra) and this court cannot allow the fault to remain on the record. Similarly, there is another fault with the evidence of a police officer **H.5098 D/Cpl. Daniel** who was brought as PW4 to tender Inventory Form. His testimony as reflected at page 35 of the proceedings of the case shows that:

...I called a trophy valuer. He prepared Inventory Form. Then I took all accused persons with their exhibits to magistrate. After seeing it, he ordered it to be destroyed as it was perishable...

From this peace of testimony, one cannot say that the accused persons participated in the proceedings before the magistrate delivered an order for destruction of the claimed Government trophy as per precedent in **Mohamed Juma @ Mpakama v. Republic** (supra).

Regarding the first offence of unlawful entry into the national park, this court cannot be detained. There is already decision of the Court of Appeal in **Dogo Marwa @ Sigana v. Republic**, Criminal Appeal No. 512 which had resolved that section 21 (1) (a), (2) & 29 (1) of the **National Park Act [Cap. 282 R.E. 2002]**, as amended by the **Written Laws (Misc. Amendment) Act, No. 11 of 2003** do not create the offence of unlawful entry into national parks. This thinking was borrowed by the same Court in the precedent of **Willy Kitinyi @ Marwa v. Republic**, Criminal Appeal No. 511 of 2019. With the approval of the indicated precedent in **Dogo Marwa @ Sigana v. Republic** (supra), at page 10 of the judgment, the Court has resolved 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. 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.*

(Emphasis supplied).

The above cited paragraph has been celebrated by this court in a bunch of precedents, without reservations (see: **Mahende Gitocho @ Mahenda v. Republic**, Criminal Appeal Case No. 159 of 2021; **Mathias Maisero @ Marwa & Another v. Republic**, Criminal Appeal No. 104 of 2021; and **Marwa Chacha @ Mwita v. Republic**, (supra). In the circumstances like the present case, it cannot be said that the prosecution had proved its case beyond reasonable doubt as per requirement of the law in section 3 (2) (a) of the **Evidence Act** [Cap. 6 R.E. 2019].

In the final analysis, I allow the appeal and quash the conviction and set aside the sentence imposed to the appellants. I order immediate release of the appellants from prison custody, unless they are lawful held.

It is so ordered.

Right of appeal explained to the parties.

F. H. Mtulya

Judge

08.03.2023

This Judgment was delivered in Chambers under the Seal of this court in the presence of **Mr. Felix Mshama**, learned State Attorney for the respondent and in the presence of the appellants, **Mr. Wilson Chacha @ Magarya, Mr. Samwel Mweng'e @ Kemore** and **Mr. Juma Gichogo @ Itembe**, through teleconference placed at this court in Bweri area within Musoma Municipality, Serengeti Prison and in the offices of the Director of Public Prosecutions, within Musoma Municipality in Mara Region.

F. H. Mtulya

Judge

08.03.2023