IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

AT TABORA

DC CRIMINAL APPEAL NO. 68 OF 2021

(Originating from Resident Magistrate Court at Tabora in Economic Case No. 74 of 2020)

ALTO MTENZI FIFI..... 1ST APPELLANT

HASSAN HUSSEIN RAMADHANI..... 2ND APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGMENT

Date of last Order: 22/5/2023
Date of Judgment: 29/5/2023

KADILU, J.

This is an appeal against the conviction and sentence meted out to the appellants by the Resident Magistrate's Court of Tabora. The appellants were jointly arraigned before the Resident Magistrate's Court of Tabora on an indictment containing two counts; in the 1st count, the appellants were jointly charged with unlawful entry into the Game Reserve contrary to section 15 (1) and (2) of the Wildlife Conservation Act, No. 5 of 2009 whereas in the second count, they were charged with unlawful possession of weapons in the game reserve contrary to section 17 (1) and (2) of the Wildlife Conservation Act No. 5 of 2009 read together with paragraph 14 of the first schedule to and section 57 (1) and 60 (2) of the Economic and Organised Crime Act, [Cap. 200 R.E 2019].

All the accused persons pleaded not guilty hence the matter inevitably proceeded to a full trial. In a bid to prove the accusations, the prosecution side paraded a total of three witnesses namely, Benson Eligan

Kihurwa, a game warden (PW1), Abdallah Ahmed Mdee, a wildlife officer (PW2) and Ruja Fabian, storekeeper (PW3). In addition, the prosecution produced three (3) exhibits namely, two knives and two bicycles as exhibits P1 collectively, Certificate of seizure (P2) and Exhibits Register book (P3). The accused, on their part, fended themselves. They did not call other witnesses nor did they produce any exhibit.

The prosecution's account was to the effect that on 28th October, 2020 at Ugalla game reserve, PW1 and PW2, Reginald Dodo and Vitus Njasi respectively, while on patrol managed to arrest the accused persons (DW1) and (DW2). The accused had in possession of weapons namely, two knives and two bicycles. Consequently, they arrested the accused and seized the items mentioned. The seized items were then listed in the seizure certificate (exhibit P2) which was signed by both the arresting officers and the accused. PW2 tendered in evidence a seizure certificate (exhibit P2).

According to PW1, the accused were then taken to Tabora. It is the evidence of PW3, a storekeeper at Ugala Game Reserve that on 29th October, 2020 he received two knives and two bicycles from her fellow wildlife officers who had come from patrol. Upon receipt of the exhibits, she labelled and register them in the exhibit register book which was tendered in court as exhibit P3.

In defense, all the accused denied the allegations. They stated that on a fateful day, they had been fishing in the Kahumbu area. In the process they found themself at Isimbila where they were arrested by wildlife officers. The accused persons stated that they had a knife and

bicycle, and they admitted that they did not have a permit authorizing them to be in a game reserve. They explained that the permit which they had was for fishing at Kahumbau camp.

Upon closure of the evidence for both sides, the trial magistrate was satisfied that the prosecution case was proved beyond reasonable doubt against all the accused in all two counts. Consequently, all the two accused were convicted of unlawful entry into the game reserve in the 1st count and unlawful possession of weapons in the game reserve in the 2nd count. They were sentenced to serve twenty (20) years imprisonment for both counts. The accused persons were aggrieved by both the conviction and sentence hence they appealed to this Court. They filed a petition of appeal containing the following grounds:

1. *That, the trial magistrate grossly erred in law and facts by convicting the appellants while they had a permit allowing them to conduct fishing activities.*
2. *That the trial magistrate grossly erred in law and facts by holding that the appellants pleaded to have been in the game reserve while in the caution statement and in the statement of facts they have denied having been found in the game reserve.*
3. *That, the trial magistrate grossly erred in law and facts by not considering that there was no independent witness who saw them entering the game reserve.*
4. *That the trial magistrate grossly erred in law and facts to enter judgment based on weak evidence of the respondent's side.*
5. *That the trial magistrate grossly erred in law and facts for making a judgment without considering that the weak evidence produced by the prosecution side was not enough to make them prove the case beyond a reasonable doubt.*

When the appeal was called on for hearing, the appellants were represented by Mr. Ally Yusuph Maganga, learned Counsel while the Republic had the services of Ms. Tunosye John Luketa, the learned State Attorney. Submitting in support of the appeal, Mr. Maganga prayed to abandon the 2nd and 3rd grounds of appeal. On the 1st ground of appeal, he submitted that the trial court erred to convict the accused persons disregarding the fact that the accused persons had a fishing permit and that they got lost and found themselves in the game reserve while in fishing activities.

The learned Counsel elaborated that at pages 32 and 34 of the proceedings, it is clearly stated that the appellants were lost. To bolster his argument, the appellants' Counsel referred to Section 11 of the Penal Code, Cap 16 R.E 2019 which provides that mistake of fact is a defence in law. He further contended that there is no clear demarcation of the game reserve from the fishing area. In addition, he explained that in this case *mens rea* was not proved. Mr. Maganga opined that the measure used to locate the appellants was a GPS, which the appellants did not have as a result they crossed the boundary and found themselves into the game reserve.

With regard to the 4th ground, the appellants' Counsel submitted that the prosecution evidence was weak and did not justify the conviction of the appellants in the trial court. He said that the wildlife officers told the trial court that they used GPS to know the area in which the appellants were found. The counsel further submitted that this evidence did not satisfy the requirement of section 110 of the Evidence Act and that GPS

coordinates are not enough to prove the demarcation and convict the appellants.

In respect to the 5th grounds, the appellants' Counsel opined that the ground is more or less the same as the 4th ground of appeal and he maintained his submissions in the 4th ground of appeal. The Counsel told the court that the credence of PW1, PW2, and PW3 was not enough to convict the appellants. In conclusion, Mr. Ally Maganga prayed the court to allow the appeal, quash the conviction, and set aside the sentence.

In rebuttal, Ms. Tunosye Luketa, learned State Attorney was in full support of the conviction and sentence. She submitted that, in the first ground, the offence of unlawful entry into the game reserve and unlawful possession of weapons in the game reserve was proved. The defence of mistake of fact raised by the learned Counsel is an afterthought as it was not raised in the trial court. It was not pleaded during the trial. The learned State Attorney further said that it is not true that PW1 said he knew the game reserve by using GPS, the truth is PW1 and PW3 were in the Patrol when they found the appellants in the game reserve.

On the 4th ground, she submitted that at pages 6 to 10 of the trial court judgment, the court explained the reasons for reaching at that decision. She opined that appellants were not convicted based on the weaknesses of their evidence, rather the strength of the prosecution evidence.

Regarding the 5th ground, the State Attorney submitted that exhibits P1 and P2 show items with which the appellants were found with while in the game reserve. She relied on the case of ***Emmanuel Lybunga v. Republic,*** Criminal Appeal No. 28 of 2020 where the search was

conducted in a remote area in which an independent witness could not be available. It was held that a search officer may conduct search and seize any exhibit without independent witness. She informed the court that in the circumstances of this case, there was no way the wildlife officers could get an independent witness during search and seizure.

Finally, the State Attorney prayed the court to dismiss the appeal.

In rejoinder, Mr. Maganga insisted that the appellants testified that they had fishing permits. The defence of mistake of fact is there and not an afterthought. Furthermore, the appellant's Counsel argued that the case cited by the learned State Attorney is distinguishable and does not apply in this case as the appellants are not challenging the question of independent witness, but weaknesses of the prosecution evidence.

In view of the submissions by the parties and the evidence on record, the issue that I am called upon to decide is whether the appeal is meritorious. This being the first appellate court, I will re-examine and re-evaluate the evidence adduced to prove each count.

It is not disputed that the appellants were arrested by the wildlife officers, PW1 and PW2. The appellants' Counsel challenges the testimonies of PW1 and PW2. PW1 and PW2 simply testified that they found the appellants at Ugala game reserve area whereas the appellants claims that they came from Kahumba camp, then they found themselves lost and it was when they met the wildlife officers. The appellants' Counsel argued that *mens rea* was not proved in this case.

Under Section 15 (1) of the Wildlife Conservation Act, [Cap. 283 R.E. 2019], any person other than a person travelling through the reserve along a highway or designated waterway is not allowed to enter a game

reserve without the written authority of the Director of Wildlife. Moreover, it is prohibited for any person to possess a firearm, bow, arrow or any other weapons in a game reserve without the written permission of the Director previously sought and obtained. Under the Act, the term "weapon" is defined as any firearm, ammunition, dart gun, missile, explosive, poison, poisoned bait, spear, bow and arrow, **knife**, axe, hoe, pick, club, stakes, pitfall, net, gin, trap, snare or any combination of these and any other device, method and or technology whatsoever capable of killing or capturing an animal.

Basically, the appellants do not dispute that they entered into a game reserve. Their contention is that they got lost and at the time of arrest they did not know that they were in the game reserve. To cement this assertation, the learned Counsel for the appellants told the court that the appellants raised a defence of mistake of fact during the trial. On this issue, I subscribe to the view by the learned State Attorney that, if the appellants wished to rely on the defence of mistake of fact, they were supposed to do so at the earlier stage to enable the prosecution to lead evidence about it.

To the contrary, the appellants merely stated during their defence that they got lost and found themselves in the game reserve. At that stage, the prosecution had already closed their case so, they were denied an opportunity to counter the appellants' contention through evidence. Mistake of fact as a defence is stipulated under Section 11 of the Penal Code which provides:

> *"A person who does or omits to do an act under an honest and reasonable, but mistaken, belief in the existence of any state of things is not criminally responsible for the act or*

omission to any greater extent than if the real state of things had been such as he believed to exist."

In the instant appeal, the appellants may not be considered as having acted honestly and reasonably because knowing that their permits were for fishing only, they ought to have taken great care to ensure that they do not cross their limit and get into the game reserve. They cannot be regarded as been honest either since they were found in the game reserve with weapons, but there were no clear explanations about the purpose of carrying such weapons in the restricted area. Under Section 11 (2) of the Penal Code, mistake of fact is excluded and may not apply where there are express or implied provisions of the law relating to the subject in question.

Going by the provisions of the Wildlife Conservation Act, there is an implied exclusion of the rule relating to mistake of fact as a defence. I find and hold so because under the Wildlife Conservation Act, knowledge is not one of the elements which are required in proving the offence of unlawful entry to the game reserve. The intention of the unlawful entry does not matter either. For that matter, it cannot be a defence for the appellants to argue that they did not know that they were in the game reserve at the time they were arrested.

This makes their defence weak and an afterthought which is bad in law. Counsel for the appellants contended that in the trial court the appellants told the court that they were lost. With due respect, that alone cannot amount to the defence of mistake of fact which had not been specifically raised and established during the trial. As long as the appellants' entry to the game reserve does not fall under the exceptions

stipulated under Section 15 (1) of the Wildlife Conservation Act, there is no justifiable explanation as to why they were in the game reserve.

It is also the appellants' account that they were in finishing activities for which they had permits so, they cannot be considered as being unlawful into the restricted area. Unfortunately, during the trial the appellants did not produce the alleged fishing permit to support their contention. When the defence case was open, the appellants addressed the trial court as follows:

1st Accused: *"I will defend my case under oath. I will have no witness to call nor exhibit to tender during the defence hearing."*
2nd Accused: *"I will defend my case under oath. I will have no witness to call nor exhibit to tender."*

Notwithstanding, the appellants admitted to the court that they did not have any permit to enter in Isimbila and that, the permit which they purported to own was for fishing in Kahumbu, Msato, Isanga and Mgona only. As for the proof that the appellants were in the game reserve, the proceedings indicate that they admitted to be arrested in the game reserve and prayed for a lenient punishment. In the case ***of Cheyonga Samson @ Nyambare vs. The Republic, Criminal Appeal No. 510 of 2019,*** the Court of Appeal held that mere narration that the appellant was arrested inside the game reserve without demonstrating the area of the arrest within the statutory boundaries of the game reserve was not sufficient proof.

In the present case, apart from oral account of PW1 and PW2 proving that the appellants were found within the game reserve, the prosecution managed to produce GPS coordinates indicating the place where the appellants were found on the fateful date. The evidence of PW1

and PW2 showed the Geographical Positioning System (GPS) indicating exactly that the appellants were arrested within the stated coordinates. After the arrest, the appellants were searched and found with two knives. A certificate of seizure was prepared consisting of the seized items and the same was signed by the appellants and arresting officers.

The trial Magistrate stated as follows at page 6 of the typed judgment:

> *"This has been evidenced by exhibit P2 the certificate of seizure which was tendered in court by PW2. Upon my perusal on the contents of exhibit P2, the GPS coordinate of the boundaries of the game reserve area have been stated therein. According to exhibit P2 the coordinates of the area alleged to be a game reserve area is 04043609368867."*

Based on these findings and in the absence of a contrary explanation by the appellants, I have no hesitation to conclude that the case against the appellants was proved beyond reasonable doubt as all prosecution witnesses and exhibits linked the appellants with the charged offence. I am therefore persuaded that the prosecution has established to the required standard that the appellants entered unlawfully to the game reserve and they were found with the weapons therein.

Accordingly, I have no doubt that the appellants were rightly convicted of the offence with which they were charged and the sentence imposed on them was a proper penalty for the offence. I thus, dismiss the appeal in its entirety. The conviction and sentence imposed by the trial court is upheld. The right of appeal is open to any aggrieved party.

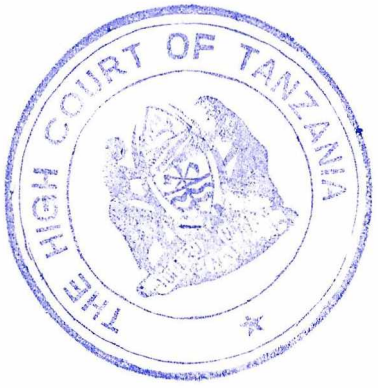
It is so ordered.

KADILU, M.J.,

JUDGE

29/05/2023

Judgement delivered on the 29th Day of May, 2023 in the presence of the appellants and Mr. Steven Mnzava and Ms. Upendo Florian, State Attorneys for the respondent, Republic.



KADILU, M. J.,

JUDGE

29/05/2023.