

UNITED REPUBLIC OF TANZANIA

JUDICIARY

HIGH COURT OF TANZANIA

MOROGORO DISTRICT REGISTRY

AT MOROGORO

CRIMINAL APPEAL NO. 13 OF 2023

(Originating from Criminal Case No. 30 of 2023 in the District Court for Kilombero at Ifakara)

SHINJE MABALA @ MAHEMBO APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

JUDGEMENT

Date of last Order: 29/05/2023

Date of Judgement: 14/07/2023

MALATA, J

The appellant herein was charged with two counts, unlawful grazing livestock in a game-controlled area contrary to section 21(1)(2) and section 111(1)(a) of Wildlife Conservation Act [Cap 283 R.E. 2022] and unlawful disturbing the habitat of the component of biological diversity contrary to section 188 (c), 66, 67, 68 and 193 (1) (a), (b), (2), (4) and (5) of the Environmental Management Act no. 20 of 2004.

In nutshell the charge sheet depicts that, for the first count, it was alleged that, on 9th of February, 2023 at Bata area, within Kilombero Game controlled area within Kilombero District in Morogoro Region, the appellant was found grazing livestock a total of 203 herds of cattle (cows) within the said game-controlled area without permit. On second count, it is alleged that, on 9th February, 2023 at Bata area, which is within Kilombero Game Controlled area within Kilombero District in Morogoro Region, the appellant destructed the habitat of the component of biological diversity by clearing the vegetation, constructing livestock kraals and grazing livestock within Kilombero Game Controlled area.

When the charge was read over and explained to the accused, he pleaded not guilty to all counts. To prove the case, the prosecution paraded five witnesses and tendered various exhibits.

PW1, Richard Temu, the wildlife officer of TAWA working at Kilombero testified that, on 09/02/2023 one Haji Yusuph Buyogela sent him coordinates to check whether the kraals were within the game controlled area. That, on 10/02/2023 they came with the GPS and upon filling data into his computer, it was revealed that, from where the kraal was found to the boundary is about 1.6 km, the kraal falls within the game-controlled area.

After processing the data, he drew the sketch map as per coordinates of the GPS. PW1 further testified that he remembers the GPS which he worked with by name and physical design, he pointed at the said GPS and prayed to tender it as an exhibit. The proceedings show that, the document was admitted without objection thus marked as exhibit **P1**. The GPS information was read before the court as shown on page 5 of the proceedings. He also tendered sketch map showing where the kraal was found and the same was admitted without objection thus marked as exhibit **P2**. (Page 5 of the proceedings). He further testified that, they do use coordinates to allocate the areas and that 1.6 kilometre from the place of incidence.

PW2, Filbert Maendeleo Laurent testified that, he is the extension officer dealing with livestock extension (veterinary, as well as general care), and that on 12/02/2023 he was called by TAWA officer who told him that there are herds of cows under custody at Chita Minazini, he found some of the cows and calf were affected by foot and mouth disease, he treated them. On 14/02/2023 he found another calf having the similar disease and treated it. On 15 and 17/02/2023 consecutively two calves died and on 20/02/2023 he wrote the report, when PW2 was shown the report, he prayed it to be tendered as exhibit and the same was admitted as **exhibit**

P3. The proceedings show that, it was admitted without objection **(at page 8 of the proceedings)**

PW3, Nuru Lekei, the wildlife warden at TAWA testified that, on 10/02/2023 he was coming from Ifakara to Chita and he was handed over herds of cattle by his fellow Haji Buyogela at Chita area totalling 203 which were caught within the game-controlled areas. He testified that two died and remained with 201 herds of cattle and that he reported to Haji Buyogela. The report on the remaining and died herds of cattle was tendered and admitted as **exhibit P4. (Page 9 of the proceedings)**

When the court reached the area, it observed that as the cattle were many asked the defence side if they have objection to the court to receive as they are, defence side raised no objection to 201 herds of cattle as per Exhibit P4.

PW4, Haji Buyogela testified that, he is the game warden at Kilombero controlled area where he has been working for eight (8) years. That, on 09/02/2023 when he was in patrol with his fellow game officers, Village Executive Officer of Melela, veterinary officer and others which they started on 11.00 at Bata within game-controlled area. They saw herds of cattle near the river bank. They also saw three huts and three people. The herds of cattle had "A" mark he remembered the person by face and

they followed them as well as the cattle which they were rearing, the people run away by dipping the flocks of cattle in the river and they were swimming to the other side, when they failed to follow them they decide to go around on the other side and wait for them at the other side of the bank on the border of Kilombero game control area.

That, they succeeded to block them and two herders managed to ran away, they managed to arrest one person who is the appellant, afterward they counted the cattle, upon counting the herds of cattle noted to be 203 in number. They interrogated the appellant and he admitted the herds of cattle to belong to him. That, PW4 prepared the certificate of seizure and the appellant signed by thumbprint. The certificate of seizure was admitted as **exhibit P5**. The proceeding shows that, exhibit P5 was admitted without objection (**Refer page 11 of the proceedings**)

That, thereafter they took the herds of cattle to *Ofisi ya Kijiji* Chita for safe custody and they were handed over to PW3.

PW5 Veronica Michael Sakala the village executive officer testified that, on 09/02/2023 they had patrol with TAWA officers. That, they went to the area known as Bata, whereby they find huts and flock of cattle's together with three people who run away after they saw them. They run onto Kihansi River, they decided to go around and they managed to arrest one

person and 203 herds of cattle. They filed the document which was filed by PW4 and PW5 signed the document as well and the appellant signed by thumbprint, exhibit P4 was also identified by PW5. **(At page 14 of the proceedings)**

After testimony of PW5 prosecution side prayed to re call PW1 under section 147 of the CPA for further examination in chief, and PW1 testified that Global Information System (GIS) which is used to follow components. GPS function is to collect coordinates on particular field, secondly is the computer which has GIS programme helps to discover coordinates is in which area, as per map exhibit P2 it bears the coordinates of the area which the appellant is found. **This marked the end of prosecution case.**

Based on the evidence by prosecution side, the trial court made a ruling that, a prima facie case was established to warrant the accused enter his defence.

To disprove the case the defence side called three witnesses.

DW1, Shinje Mabala testified that, he stays at Melela for almost 20 years, and he is staying with his mother and wife, he had 203 herds cattle and he is grazing at the village area. On 09/02/2023 about 15.00 hours he put oxen plough on cattle and he was going to the farm, about 10.00 hours

he returned home. His farm is not far from his house is like 200 metres, on 09.00 hours he returned to the farm to remove weeds on the paddy.

On that day he was with his neighbour one Manda and they returned home about 19.00, they passed through the kraal and they found the herds of cattle being flocked by game officers, the village executive officer they wanted to take them away, DW1 testified that he was with Manda, his wife and other neighbour by the name of Bulembo Luhanga, he called PW2 and told him the game officer and the village executive officer has taken away his livestock, he asked him why and comforted him to wait until they decided.

Later on, DW1 called village executive officer and he replied by telling him to follow them at their office. DW1 went to report to the chairman

On 10/02/2023 about morning hours he went to collect back his herds of cattle at Melela village and found nothing, he informed Dr. Mifugo and he told him to go to Chita Ward Executive office, he went there and he introduced himself as the owner of the cattle and he was arrested instantly and brought to Chita police station where he was interrogated and he told by the the police that his cattle were snatched from him on 09/02/2023. He was detained and forced to sign the caution statement, on 18.00 he was taken to Ifakara, on 10/02/2023 he signed the document while at the

police station Chita, he doesn't know how to read and write. DW1 denied committed the offence stated.

DW2, Manda Mahembo testified that, he is staying at Melela Village since 2000 and the appellant is his brother's child. On 09/02/2023 while at his home farming with the appellant they return at 19.00 and they heard the shouting and they rushed up there and found the askari took the cattle of the appellant, he managed to identify VEO only, they advised the appellant to follow the cattle on the next day.

DW3, Ulengo Charles testified that, the appellant is his neighbour and DW2 is the guardian of the appellant. He further testified that in Melela there is area for grazing cattle that belong to Melela Chita. On 09/02/2023 the appellant's son came to DW3 house crying, he went to the place of incidence and he found the game officers took the herds of cattle of the appellant from his kraal. They confronted the appellant and advised him to call Bwana shamba. **This marks the end of the defence case.**

Having gone through the evidence by both side, trial court was satisfied that, the offence arraigned against the accused/ Appellant were proven beyond sane doubt. As such, it proceeded to convict the accused for the two offences and sentenced him to pay a fine of TZS 500,000 or to serve custodial sentence of 12 months in prison for the first count and for the

second count he was sentenced to pay a fine of TZS 1,000,000 or to serve custodial sentence of two years. Further, the trial court ordered for forfeiture of the 201 herds of cattle under section 111 (a) of the Wildlife Conservation Act, Cap.283 R.E.2022.

Dissatisfied thereof, the appellant knocked the doors of this court armed with five grounds of appeal. These are;

1. That, the learned trial Magistrate erred in law and fact to shift the burden of proof to the appellant.
2. That, the learned trial Magistrate erred in law and fact to rely on the prosecution's contradictory evidence to convict the appellant.
3. That, the learned trial Magistrate erred in law and fact to disregard the defence of alibi raised by the appellant.
4. That, the learned trial Magistrate erred in law and fact to sentence the appellant without recording the mitigation sentence and confiscation order of the appellant's 203 herd of cattle.
5. That, the learned trial Magistrate erred in law and fact to convict the appellant on the second count without any evidence.

Basing on afore stated the grounds of appeal, the appellant prayed to this court to allow the appeal, quash conviction, set aside sentence and order for restoration of the confiscated herds of cows totalling 203.

On the date of hearing of the appeal, the parties enjoyed legal services of their learned counsels, whereas, the appellant enjoyed the legal services of Mr. Abraham Hamza Senguji assisted by Mr. Henry Kitambwa, both learned counsels, the Republic enjoyed legal service by Mr. Emmanuel Kahigi and Simon Mpina, learned State Attorneys.

Submitting in support of the appeal, Mr. Senguji learned counsel argued on ground 2 by pointing out the contradiction. The **first** contradiction is on the time of arrest, that PW4 testified that, the appellant was arrested at 16.00 pm while PW5 stated that the appellant was arrested on 19.00 hours.

Second, is on what happened after the arrest, PW4 stated that after the arrest they let the appellant go as reflected at page 11 of the proceedings while PW5 testified that, the appellant was retained and not otherwise as testified by PW4.

Third, the evidence by PW4 was that, there was five people who were on patrol whereas PW5 testified that they were about 50 in number. The **fourth** contradiction is that, PW5 stated that they saw and identified the appellant about 1.6 km while PW4 testified that they went to the kraal fence where they identified the appellant, PW4 and PW5 were together

on the date of the incidence. He thus commented that they are all not reliable.

To cement his position Mr. Senguji referred this court to the case of **WILFRED LUKAGO VS. REPUBLIC [1994] TLR 189** where the court held that, where there is serious contradiction, it is impossible to assess the credibility.

As to the 1st and 3rd ground Mr. Senguji the learned counsel submitted that there was a shift of burden of proof. The appellant raised a defence of alibi and the court ordered him to prove his alibi. He referred this court to the case of **SIJALI JUMA KOCHO VS. REPUBLIC [1994] TLR 206**, where the court held that, the appellant was under no obligation to prove alibi. He further cited the case of **JUMANNE RAJABU ALIAS NGALAMANGONGO AND ANOTHER VS. REPUBLIC [1999] TLR 69** and **PIA JOSEPH VS. REPUBLIC [1984] TLR 161, RASHID ALLY VS. REPUBLIC [1987] TLR** and stated that the accused has no burden of proving the alibi, it is the duty of the court to direct its mind properly to any alibi set up by the accused. In this case the alibi was not accorded weight and by doing so the trial court erred in law by ignoring the defence of alibi, thus erroneously convicting the appellant. The alibi was at least to be considered as it raised doubts on the prosecution side. In the case

of **Rashid Ally** (supra) the court stated that where the accused person put defence of alibi it introduces doubts on the prosecution side thus it has to be considered.

In the present case, the appellant raised defence of alibi thus casting doubts to the evidence of the prosecution. The appellant claimed that, he was not at the scene of the crime but the cows were taken at home and that he was at home when the cows were collected by 50 people armed with short/SMG. Additionally, Mr. Kitambwa learned counsel submitted that, the defence of alibi was not contradicted that the appellant was at home with his herds of cattle, as such had it been considered the trial court could have arrived to a different position of not finding the appellant guilty.

Submitting on the 4th ground, Mr. Senguji the learned counsel stated that, the trial court's decision has no sentence and the sale of appellant's herds of cattle was made without any sentence or order of confiscating 203 herds of cattle.

However, this court verified with the original handwriting judgement and noted that, the sentencing part of the judgement was not typed but it is in the judgement. Both counsels of the appellant and respondent were shown the handwritten judgement from the original file.

As to the fifth ground on convicting the appellant on the second count without any evidence, Mr. Senguji submitted that, PW5 testified that he did not know who built the said hut in the game reserve. Also, PW4 testified that, he has never saw the appellant clearing and building the area. There was no evidence to that effect. Further the charging provisions doesn't create the alleged offence. Finally, he prayed that, the appeal be allowed, conviction be quashed and the confiscated herds of cattle totalling 203 be returned to the appellant.

Mr. Emmanuel Kahigi, learned State Attorney submitted in reply to 1st and 3rd ground of appeal on the burden of proof and alibi, that at page 14 of the judgement, it is indicated that the burden of proof lied on the prosecution and was proved accordingly, this goes hand in hand with duty of proof in criminal cases that the burden of proof lies on the prosecution. The trial court was satisfied through **Exhibit P5** and stated at page 14 of the judgment

As to the 2nd ground on the contradiction Mr. Kahigi stated that the evidence adduced by PW4 and PW5, were without contradictions whatsoever between the two witnesses which go to the root of the matter thus causing injustice to the appellant. It is not in dispute that the appellant was arrested and later he was released thus no contradiction.

On the issue of arresting people that, they were about fifty in number. PW5 testified they were about 50 people in cross examination while PW4 is silent on the number of people, should there be any contradiction the same doesn't go to the root of the matter.

On the 4th ground of appeal that, that the appellant was not dully sentenced, no mitigation ever been entered before sentence as per the typed proceedings supplied to the parties, thus no sentence. The court went through the hand written court records dully signed by the trial Magistrate and noted item of mitigation and sentence. However, it was not reflected to the typed proceedings and judgement. This court did show the court records to the parties and both parties confirmed the presence of mitigation, sentence and its orders. In that regard, Mr. Kahigi submitted that, this court and the parties be guided by original record of the court which is the controlling version and not otherwise. Mr. Kahigi submitted that, since the appellant was properly convicted and sentenced then this ground is unfounded.

On the 5th ground Mr. Kahigi submitted that, the allegation that charging section to the offence disturbing the habitat do not create the offence charge is unfounded. He submitted that, the cited provision is correct and creates the offence.

Finally, Mr. Kahigi submitted that, evidence by PW1, PW2, PW3, PW4 and PW5 together with exhibits proved the case beyond sane of doubt that the herds of cattle were found in the conservation area being grazed. Consequently, Mr. Kahigi prayed for the appeal to be dismissed. As to the costs prayed by Mr. Senguji for appellant, Mr. Kahigi submitted was of the opinion that, this being a criminal case, legally it does not attract costs thus a prayer for cost is unfounded in criminal cases.

By way of rejoinder, Mr. Senguji submitted that, the trial court shifted the burden of proof and defence of alibi to accused as opposed to what the law requires. He referred this court to on page 14 of the judgement.

As to the 2nd ground he submitted, he reiterated his submission in chief, thus the evidence of PW4 and PW5 are not reliable, and the evidence by PW1, PW3 and PW3 are just hearsay evidence.

He finally prays that, the appeal be allowed, conviction be set aside and order for restoration of confiscated 203 herds of cattle and return of 1,500,000 paid by the appellant. **This marks the hand of brief submission from both sides.**

In view of the above, brief summary this court has managed to gather the issues for determination that;

1. Whether the prosecution side proved that, the area in dispute forms part of the Kilombero game-controlled area,
2. Whether the prosecution proved beyond sane of doubt that the appellant was found grazing herds of cattle and built kraal in the Kilombero game-controlled area,
3. Whether the appellant was properly convicted and sentenced,
4. Whether there was contradiction by the prosecution side touching the root of the matter,
5. Whether defence of alibi by the appellant was properly considered by the court

To start with, the appellant was charged with two counts that is; unlawful grazing livestock in a game-controlled area contrary to section 21(1)(2) and section 111(1)(a) of Wildlife Conservation Act [Cap 283 R. E. 2022] and unlawful disturbing the habitat of the component of biological diversity contrary to section 188 (c), 66, 67, 68 and 193 (1) (a), (b), (2), (4) and (5) of the Environmental Management Act no. 20 of 2004.

Section 21(1) of the Act reads:

21.-(1) Any person shall not, save with the written permission of the Director previously sought and

obtained, graze any livestock in any game-controlled area.

(2) Any person who contravenes this section commits an offence and shall be liable on conviction to a fine of not less than one hundred thousand shillings but not exceeding five hundred thousand shillings or imprisonment for a term of not less than one year but not exceeding five years, or to both.

The prosecution therefore, was duty bound to prove that the appellant was found in the Game controlled area as alleged in the particulars of all counts. This being a criminal case the general rule is that, it is the prosecution and not the accused, except for exceptional cases, who has the burden of proving the case against the accused beyond reasonable doubt.

This stance is well articulated in the cases of **Joseph John Makane vs. Republic** [1986] TLR, **Mohamed Said Matula vs. Republic** [1995] TLR 3 and **Anatory Mutafungwa vs. Republic**, Criminal Appeal no. 267 of 2010 (unreported).

In this case, therefore, it is not sufficient to simply state in general that, the appellant was found in the game-controlled area without showing that, the said area is within the statutory limit of the game-controlled area. It

is in that regard, the prosecution had a hill to climb in establishing that, the area in dispute is really fall within the Kilombero Game Controlled Area.

To prove this kind of issue, the prosecution side must lead this court to; **one**, the law, **two**, valid Government Gazzette naming the area to be controlled, **three**, drawings establishing the area and where the appellant was found and **four**, any kind piece of evidence proving that, the area is controlled one and that the appellant was found in the said area committing offences contrary to the conservation law.

As matter of historical backgrounds, area in dispute has undergone several changes pre- and post-independence. In 1951, the British colony had enacted the Fauna Conservation Ordinance, Cap.302 referred to as Act No. 17 of 1951. Under item 102 to schedule seventh declared parts of Kilombero as Game Controlled area. Item 102 reads that

102. Kilombero Controlled Area, Ulanga District

Boundaries.- commencing at a beacon situated on the south bank of the Kilombero River three miles south-eas of the confluence of the Msolwa and the Kilombero Rivers at Boma ya Ulanga: thence following a south-Westerly direction to Lupiro: thence in a south-westerly direction following the motor road through Maliny1 to Mkasu; thence in a north-westerly direction to Utengule: thence

up- stream along the right bank of Mpanga River to its confluence with the Luiga River; thence in a north easterly direction to Chita; thence in a north-easterly direction following the motor road through Ifakara and Kiberege to the bridge over the Msolwa River; thence in a southerly direction following the Msolwa River to its confluence with the Kilombero River; thence following the Kilombero River down-stream to the point of commencement.

In 1974, which is after independence, the Fauna Conservation Ordinance, was repealed and replaced by the Wildlife Conservation Act, 1974. Section 85 (1) of the Act provides that;

(1) The Fauna Conservation Ordinance is hereby repealed.

In 1997, the Minister in the exercise of section 9 of the Wildlife Conservation Act, 1974 published **the Wildlife Conservation (Game Controlled Areas) Order G.N. 459 of 1997** declaring Kilombero Game Controlled Area a Game Controlled, among others. Paragraph 2 of the said Order.

"The Areas described in the Schedule to this Order are hereby declared to be Game Controlled Areas."

Item 10 of the scheduled to the said Order provides that;

10. Kilombero Game Controlled Area

Boundaries: "Commencing at a beacon situated on the south bank of the Kilombero river five kilometres south-east of the confluence of the Msolwa and the Kilombero Rivers at Boma ya Ulanga; the boundary shall follow a south-westerly direction to Lupiro; thence southwestwards along the motor road through Malinyi to Mkasu; thence in a north-westerly direction to the Mpanga river at Utengule; thence upstream along the right bank of the Mpanga river to its confluence with the Luiga river; thence in a north-easterly direction to Chita; thence in a north-easterly direction following the motor road through Ifakara and Kiberege to the bridge over the Msolwa river; thence in a southerly direction following the Msolwa river to its confluence with the Kilombero river; thence following the Kilombero river downstream to the point of commencement."

The responsible Minister declared a total area of 6,500 sq. k.m Kilombero as Game Controlled Area

In 2009, the Wildlife Conservation Act Cap.283 R.E.2022 was enacted and repealed the Wildlife Conservation Act, 1974. Section 122(1), (2) and (3) of the Wildlife Conservation Act depict that;

"(1) The Wildlife Conservation Act, 1974 is hereby repealed

(2) Upon the commencement of this Act, a person who is convicted of an offence under the Wildlife Conservation Act shall, notwithstanding the provisions of other written law, be liable to be deemed as having been convicted under the corresponding offence under this Act

(3) Any rule, order, regulation, direction, notice, notification or other administrative act made, given, issued or undertaken before the commencement of this Act or under any law repealed or amended in a material particular to this Act shall, if it could have been made, given, issued or undertaken under corresponding provision of this Act, continue in force and have the like effect as if it had been so made, given, issued or undertaken under this Act."

Section 122 (3) of the , the Wildlife Conservation Act Cap. 283 R. E. 2022 as quoted herein above recognised and adopted any rule, order, regulation, direction, notice, notification or other administrative act made, given, issued or undertaken before the commencement of the Wildlife Conservation Act, 2009 or under any law repealed or amended in a material particular to this Act shall, as if it was made, given, issued or undertaken under corresponding provision of Wildlife Conservation Act, 2009 continue in force and have the like effect as if it had been so made, given, issued or undertaken under Wildlife Conservation Act, 2009.

In February, 2023, the existing Kilombero Game Controlled Area was declared a Game Reserve (**TANGAZO LA SERIKALI NA 64 L A TAREHE 17/2/2023: AMRI YA KUTANGAZA PORI LA AKIBA KILOMBERO YA MWAKA 2023**). The same made by the President in the exercise of her legal mandate under section 14 of the Wildlife Conservation Act, Cap. 283 R. E. 2022

14.-(1) The President may, after consultation with relevant local authorities, and by order in the Gazette, declare any area of Tanzania to be a game reserve.

(2) The President may, by order in the Gazette, apply any condition applicable to a game reserve to any area of

Tanzania and upon such order being made the condition specified therein shall apply to the area in relation to which the order is made as if such area were a game reserve, and any contravention of such condition in or in relation to such area shall be punishable accordingly.

Having so said, I am satisfied that, within Kilombero there is an area legally reserved known as Kilombero Game Controlled Area which traces its legal background of protection from 1951 to date as categorically stated herein above. **This marks the end of legal existence of the Kilombero Game Controlled Area now the Game Reserve.**

In instant case, at the trial court, PW1 named the law and Government Notice 269 of 1974 with its changes occurred in 1997 which extended the area to cover 6,500 sq. k.m as Kilombero Game Controlled Area.

Further, PW1 testified that, he drew the sketch map as per Global Position Services (GPS) of where the incidence happened which is 1.6 kilometre within the boundary. The GPS and its physical design were tendered and admitted unopposed by appellant herein thus marked as Exhibit **P1** and **P2**. This fact indicated where the appellant was arrested with his herds of cattle.

PW2 did show where the herds of cattle were found which is within controlled area and the court visited the locus in quo. Further, PW2 evidence and **Exhibit P4** showing total number of herds of cattle arrested and the same was tendered and admitted without objection by the appellant.

PW3 being one of warden officer was present at scene of crime and participated in arresting the appellant and herds of cattle. PW3 prepared certificate of seizure of herds of cattle which was signed by the appellant by thumb and other people present signed. PW3 tendered the certificate of seizure and the same was admitted without objection from the appellant thus marked as **Exhibit P5**

PW5 echoed similar stand as she was present at the scene of crime when the appellant was arrested.

Additionally, Exhibit P1 and P2 the GPS and Sketch map provide for among others, where Kraal and huts were built which is within the boundary of the controlled area by 1.6 kilometres. This piece of evidence was admitted without any opposition from the appellant.

There was no evidence from the appellant's side to disprove the prosecution evidence by PW1, PW2, PW3, PW4 and PW5 and Exhibits P1, P2, P4 and P5.

During cross examination, DW1, the appellant just testified that, I quote

"I don't know the area which we graze is on the game-controlled area or Village. I know the area has beacon. I know the boundaries of Kijiji cha Melela. I did graze on the area allocated by Village authority of Melela.....

I don't know if my house is on game controlled area." (At page 20 of the proceedings)

On the basis of the evidence on record, this court is satisfied that, in the absence of opposite evidence watering down the prosecution evidence, the evidence available proved the offence of unlawful grazing livestock in a game-controlled area contrary to section 21(1)(2) and section 111(1)(a) of Wildlife Conservation Act [Cap 283 R.E 2022] and unlawful disturbing the habitat of the component of biological diversity contrary to section 188 (c) , 66, 67, 68 and 193 (1) (a), (b), (2), (4) and (5) of the Environmental Management Act no. 20 of 2004.

The rationale behind is that, **one**, appellant was arrested in the game controlled area being 1.6 kilometre within the boundary, **two**, appellant was grazing a total of 203 herds of cattle in the game controlled area, **three**, the appellant did clear the vegetation and built kraal and huts within game controlled area, **four**, appellant signed by thumb the

certificate of seizure of 203 herds of cattle which were compounded from the game controlled area, *five*, the appellant did not dispute the key evidence by PW1, PW2, PW3, PW4 and PW5 and Exhibits P1, P2, P4 and P5, *six*, the appellant through his testimony confessed that, he know the area has beacon, *seven*, the appellant testified that, he doesn't know the area which is within the game-controlled area or Village and *eight*, the appellant that testified that he don't know if his house within the game controlled area.

That being the case, I am of the settled view that, there is no evidence warrant this court to fault the trial court's decision. **This ground of appeal is accordingly dismissed.**

Regarding 4th ground of appeal the appellant faults the learned trial magistrate that there was no sentence against the appellant and that there was mitigation and confiscation order of the appellant' herds of cattle. This court took liberty to revisit the original records of the trial court and the same was supplied to the parties and found out that the copies supplied to the parties are missing the essential part of mitigation and sentence. That being the case what is the position in the law in such circumstance? The answers are found in the case of **Halfani Sudi vs. Abieza Chichili [1998] TLR 527**, the court held that;

- 1. A court record is a serious business it shouldn't be lightly impeached.*
- 2. There is always a presumption that a court record accurately represents what happen.*

The original court record show what transpired including; conviction, mitigation, sentence and orders. The appellant did not take trouble to peruse what is on record before raising the same as ground of appeal. As such, the court record contains correct record and guided by the above legal position, the original court record prevails. Further, after being shown the original record, the appellant's counsels had nothing to comment. This ground therefore has no falls.

As to the alleged contradictions by the prosecution evidence, this court will be guided by the principles in the case of **Mohamed Said Matula vs. Republic** (supra) to resolve the same. The court, among other things, held that;

Where the testimonies by witnesses contain inconsistencies and contradictions, the court has a duty to address the inconsistencies and try to resolve them where possible; else the court has to decide whether the inconsistencies and

contradictions are only minor, or whether they go to the root of the matter.

It is correct at this point to say that contradictions and inconsistencies in evidence by the witnesses are inevitable due to different observations and how people perceive things, lapse of time from the day of the incidence to the day the witness is called to adduce evidence. One cannot expect a witness to remember each and every dot of event at hundred percentage. Some contradictions are inevitable. However, there are contradictions which go to the root of the matter (material contradiction) which have effect to the evidence and case itself.

In the case of **Said Ally Ismail vs. Republic**, Criminal Appeal no. 249 of 2008 for instance, the court observed that;

"It is not every discrepancy in the prosecution case that will cause the prosecution case to flop. It is only where the gist of the evidence is contradictory then the prosecution case will be dismantled."

The question which comes at this juncture and which we are enjoined to answer is whether the contradictions in evidence in the case at hand were

so material as to go to the root of the matter and thus affecting the prosecution case.

It is true that, through court proceedings there are contradictions and inconsistencies, **first**, there is contradiction on the time of arrest, however that doesn't change the fact that, the appellant was arrested and the appellant himself testified that he was arrested, **second**, the contradiction on what happened after the arrest, PW4 stated that after the arrest they counted the herds of cattle prepared and filed the certificate of seizure and they let the appellant go while on his submission the learned counsel stated that PW5 testified that they retained the appellant, in the court proceedings there is nowhere PW5 stated that the appellant was retained, she testified from the time they arrived the scene of the crime to the arrest of the appellant, **third**, contradiction on the number of people who were at the patrol, PW5 stated during cross examination that there were about fifty people, PW4 during cross examination stated the names of the people who were with him at the time of the arrest and **fourth**, on the presence or not of one Filbert Maendeleo on the date of arrest PW4 on cross examination mentioned the name of Filbert Maendeleo as one of the people who were on the patrol but Filbert Maendeleo who testified as PW2

in his testimony he testified from 12/02/2023 when he was called by TAWA officer to go and treat one of the detained calf.

I am of the settled view that, the contradiction and inconsistencies are; **first**, connection to arrest process of the appellant, **second**, the appellant doesn't dispute that fact the arrest. In my view all the raised inconsistencies did not go to the root of the matter, thus affecting the prosecution case. What was before the trial court is the appellant being arrested with herds of cattle within the legally prohibited area.

This was not vehemently counted by the appellant. Further, the appellant did not oppose Exhibits P1, P2, P4 and P5 in which, among others, established where and with what the appellant was arrested. Contradictions and inconsistencies have to be weighed against other evidence and how it affects the matter in controversy or tends to water down reliability of the testimony. I have observed nothing watering down the evidence by PW1, PW2, PW3, PW4 and PW5 and the all the exhibits admitted without opposition by the appellant.

The most important evidence to be attacked were on the matters of; **one**, where the appellant was arrested, **two**, where the herds of cattle were found, **three**, where the appellant's huts were built, **four**, the appellant's herds of cattle and huts were found within the protected and prohibited

area 1.6 kilometres within the boundary and **five**, the area in dispute a reserved one.

Based on the afore stated reasons, the existence of any contradiction in this case didn't affect the prosecution case. **This ground lacks merit and it is accordingly dismissed.**

Reverting to the 1st and 3rd ground, Mr. Senguji submitted that, there was shift of burden of proof. It is a trite law that, in criminal case the burden of proof always lies on the prosecution side and it never shift to the accused, see the decision of the court of appeal in the case of **George Mwanyingili vs. Republic**, Criminal Appeal no. 335 of 2016, **Nchangwa Marwa Wambura vs. Republic**, Criminal Appeal no. 44 of 2017 (unreported).

Therefore, the prosecution is duty bound to prove the offence beyond reasonable doubt while the defence is supposed to raise doubts so as to discredit the prosecution evidence. The case against the appellant finds its root on the allegation that he was found in the game-controlled area grazing his livestock. At the trial, the appellant raised the defence of alibi showing evidence that the appellant was not at the scene of crime, thus knows nothing. Under criminal law, alibi is a legal defence whereby the accused want the court acquit him as he was neither present at the scene

of crime nor commit any offence for the reason that, he was somewhere else when the crime occurred.

In the instant case, the appellant faulted the learned trial Magistrate for failure to consider his defence of alibi and shifted the burden of proof on the appellant's side. It was appellant testimony that on 09/02/2023 when the prosecution allege that the appellant was found on Kilombero Game controlled area and then arrested the appellant stated that on the material date he was at his home at Melela Village within Chita Ward.

It is important to note that matters of defence of alibi are regulated by section 194 (4), (5) and (6) of the CPA. The said provisions provide that:

"194 (4) Where an accused person intends to rely upon an alibi in his defence, he shall give to the court and the prosecution notice of his intention to rely on such defence before the hearing of the case;

(5) Where an accused person does not give notice of his intention to rely on the defence of alibi before the hearing of the case, he shall furnish the prosecution with the particulars of the alibi at any time before the case for the prosecution is closed;
and

(6) If the accused raises a defence of alibi without having first furnished the prosecution pursuant to this section, the court may in its discretion, accord no weight of any kind to the defence. "

In the case of **Charles Nanati v. Republic**, Criminal Appeal No. 286 of 2017, the Court, while relying on the case of **Hamisi Bakari Labani v. Republic**, Criminal Appeal No. 108 of 2012 (both unreported) it is clearly summarized that, the scenarios to be taken into account by a person who wishes to rely on the defence of alibi, that:

"The law requires a person who intends to rely on the defence of alibi to give notice of that intention before the hearing of the case (section 194 (4) of the Criminal Procedure Act, Cap 20). If the said notice cannot be given at that early stage, the said person is under obligation, then, to furnish the prosecution with the particulars of the alibi at any time before the prosecution doses its case, short of that the court may on its own discretion accord no weight to that defence."

It is on record that, the appellant in the present case, opted to pursue the scenario indicated under section 194 (5) of the CPA as he furnished the prosecution with the notice on his defence of alibi before hearing of the case.

The main issue in the appeal must be on the question of whether the trial magistrate correctly dealt with the alibi defence raised by the appellant. Once again, as the appellant raised the defence of an alibi, the evidential burden shifted back to the prosecution to prove beyond any reasonable doubt that the appellant's alibi was false.

This court has gone through the Judgement and noted that on page 13 of the judgement the trial magistrate raised issues for determination. The first issue is on whether the accused person has succeeded in proving alibi, by that statement the trial magistrate shifted the burden of proof to the appellant which is contrary to the cardinal principle that, the prosecution has the duty of proving the case beyond reasonable doubts.

The appellant had only to raise doubts on their presence at the scene of crime and the prosecution had to prove its case beyond reasonable doubt. The appellant's story needs not be believed. They had only to raise a reasonable doubt and not to prove anything. This court hold that, it was wrong for the court to have such kind of issue which sounds like putting burden of proof to the appellant.

However, on the course of analysing the evidence at page 14 of the judgement the trial Magistrate commented on how the prosecution side

discharged its duty of proving that, the appellant was present at the scene of the crime. I quote;

"As per evidence adduced by witnesses, PW4 and PW5 it is clearly shown the prosecution has discharged its burden of proving that accused person was present at commission of crime and he duly signed the certificate of seizure..."

The trial magistrate pointed out how the prosecution evidence was watertight because the prosecution witnesses proved how they saw the appellant at the scene of the crime and that is why the trial magistrate came to the conclusion that the defence of alibi could not stand and overshadow the prosecution evidence.

The evidence through Exhibits P1, P2, P4 and P5 which were tendered without any objection from the appellant proved beyond sane of doubt that, the appellant was present in the Game controlled area. How did the appellant let the evidence incriminating him to the commission of offence to pass unopposed and thereafter start raising such issue like that of defence of alibi. The Evidence by PW1, PW2, PW3 PW4 and PW5 and Exhibits P1, P2, P4 and P5 watered down all what the appellant attempted to raise defence of alibi inclusive.

Moreover, during cross examination, DW1, the appellant testified that, I quote

"I don't know the area which we graze is on the game-controlled area or Village. I know the area has beacons. I know the boundaries of Kijiji cha Melela. I did graze on the area allocated by Village authority of Melela.....

I don't know if my house is on game controlled area." (At page 20 of the proceedings)

The above testimony by the appellant confirms that, he was grazing herds of cattle in the Game controlled area and built the house thereon which evidence is in line with Exhibits P1, P2, P4 and P5 and testimonies by PW1, PW2, PW3 PW4 and PW5. The appellant through the above quoted testimony confirmed that, the areas he used to graze has beacons, yet stated that, he does not know if the area is Game controlled area. Surely, this is a mindboggling.

In the case of **Ali Amsi vs. The Republic**, Criminal Appeal no. 117 of 1999 (unreported) the court of appeal observed that;

"It is of course not the law that once the alibi is proved to be false, or is not found to have raised doubts, the task

of proving the accused's persons guilty is accomplished. There must be still credible and convincing prosecution evidence on its own merit to bring home the alleged offence."

In view of what is stated herein above, the appellant's alibi was without merits. **This ground of appeal equally falls down.**

Turning to 5th ground of appeal, the appellant faults the trial magistrate for convicting the appellant on the second count without any evidence. For the record the second count is unlawful disturbing the habitat of the component of biological diversity, the prove of the second count depend largely on the proof of the first count, once the first count is proved impliedly the second count is proved. The provision which the appellant is charged with states that;

188. Any person who

*(c) disturbs the habitat, of a component of biological diversity in contravention of guidelines and measures prescribed under sections 66, 67 and 68 or other provisions, of this Act **commit an offence and shall be liable on conviction to a fine not exceeding ten million shillings or to imprisonment for a term not exceeding five years or to both.***

Section 66, 67 and 68 provides for conservation of biological diversity *in situ* and *ex situ*, the minister is empowered to make regulation regulating appropriate access to genetic resources. Further section 193 provides;

193.-(1) The court, before which a person is charged with an offence against this Act or any regulations made under this Act, may direct that, in addition to any other order -

(a) upon the conviction of the accused; or

(b) if it is satisfied that an offence was committed orders notwithstanding that no person has been convicted of the offence, order that the substances, equipment and appliances used in the commission of the offence be forfeited to the Government and, be or disposed of in the manner as the court may determine.

(2) In making an order under subsection (1), the court may also order that the cost of disposing of the substances, equipment and appliances referred to subsection (1), be borne by the accused.

(4) In addition to any fine imposed upon by the court, the court may order the accused person to do community work, which promotes the protection of the environment.

(5) Without prejudice to the generality of this section, the court may also issue an environmental restoration order against the accused in accordance with this Act, regulations, guidelines or standards made under this Act.

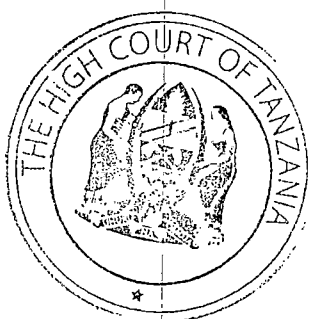
Under section 3 of the Environmental Management Act, biological diversity is defined as the variability among living organisms from all sources including, terrestrial ecosystems, aquatic ecosystems and the ecological complexes of which they are part; this includes diversity within species, among species and of ecosystems; therefore by clearing the vegetation, constructing livestock kraal and grazing the livestock within the game controlled area amounted to disturbing the habitat of the component of biological diversity found in the game, and that is enough evidence to convict the appellant under section 188 of the Act. **Therefore, the 5th ground lacks merit and is hereby dismissed.**

All said and done, this court hereby hold that the prosecution side did proved case beyond reasonable doubt as reasoned herein above.

As such, I am in total disagreement with all what has been presented by the learned counsels for the appellant. This appeal is therefore devoid of merits and it is accordingly dismissed.

IT IS SO ORDERED

DATED at MOROGORO this 14th July, 2023

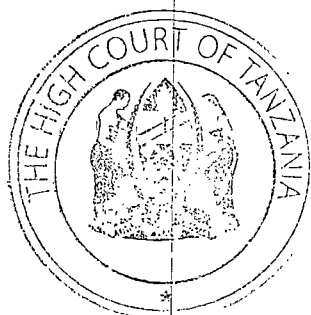



G. P. MALATA

JUDGE

14/07/2023

DELIVERED at MOROGORO this 14th July, 2023




G. P. MALATA

JUDGE

14/07/2023