

IN THE HIGH COURT OF TANZANIA

MUSOMA DISTRICT REGISTRY

AT MUSOMA

CRIMINAL APPEAL NO. 101 OF 2023

(Originated from Criminal Case No. 107 of 2023 of the District Court of Bunda at Bunda)

DIRECTOR OF PUBLIC PROSECUTION APPELLANT

VERSUS

MAGEMBE S/O MBUNDA @MALONGO 1st RESPONDENT

MASHAKA GIGITA NYANGAKA 2ND RESPONDENT

JUDGMENT

01th & 09th November, 2023

M. L. KOMBA, J.:

In this appeal, this court is invited to respond on whether forfeiture as listed under section 29 (2) of the National Park Act, Cap 282 R.E 2002 (Cap 282) is mandatory. This question reminds me of the lectures on statutory interpretation and elementary course in Legal Method. I extend my sincere appreciation to all my lectures. From submission of learned minds of State Attorney and Advocate, the most confusing words are shall and may.

Brief facts of the case during trial goes like this; on 2nd October, 2023 at Mbuga za Rwashangi which is within Serengeti National Park in Bunda

District, Mara Region both appellants were alleged to introduced domestic animals in National Park (452 herds of cattle) without permit from the Director of Wildlife or Warden or any authorized personnel and they too disturbed the component of the biological diversity (Flora and Fauna). Appellants denied the charge, the fact which attracted full trial. Prosecution paraded four (4) and two exhibits to substantiate charges levelled against appellants.

At the closure of prosecution case, the trial Magistrate found prosecution managed to prove the offences beyond reasonable doubt and appellants failed to shake prosecution evidence. Following that finding, the trial Magistrate convicted the appellants on both counts and invited State Attorney (Isihaka Ibrahim) and the counsel for the appellants (then accused, Mr. Emmanuel Paul Mng'arwe) for aggravation and mitigation factors and proceeded to pronounce punishment.

On the first count, the Magistrate sentenced each accused to pay fine of 10,000/ or to serve one-year imprisonment. On the second count, each accused was sentenced to pay fine to the tune of 5,000,000/ or serve three years imprisonment. Further, the trial Magistrate refrain from ordering forfeiture as prosecution failed to display the extent of disturbance on the

habitant component of biological diversity caused by the appellants herein. This is the base of this appeal as hinted earlier.

Mr. Isihaka Ibrahim, State Attorney representing Director of Public Prosecution rushed on the same day (26th October, 2023) to this court and filed this appeal under certificate of urgency that cows which were ordered to be returned to respondents herein instead of being forfeiture may no longer be found if the order of the trial court executed. Further the order could affect appellant in case the appeal succeed and lodged the following grounds;

- 1. That the trial Magistrate erred in law and fact for failure to order the 452 cows to be forfeited to the Government.*
- 2. That the trial Magistrate erred in law and fact for raising and addressing issues while sentencing appellant regarding to 452 cows without affording appellant opportunity to be heard during sentencing hearing.*

When this appeal placed for hearing, appellant was represented by Mr. Isihaka Ibrahim, State Attorney who submitted that Section 25 (e) of Penal Code, Cap 16 provides different punishment including forfeiture and section 167 (1) of the Criminal Procedure Act, Cap 20 allow combination of sentence during punishing accused. For him, accused is punished so as to

be a lesson for the accused and general public and shared a fruitful literature on punishment as discussed in **Xavier Sequeira vs Republic**, Criminal Revision No. 4 of 1993. Arguing on the first ground, State Attorney asserted that trial court failure to order forfeiture was against section 29 (2) of Cap 282 as forfeiture is mandatory as the word used is *shall*. To him, the trial court was supposed to direct the 452 cows be forfeited or any other order but not the order which benefited respondents as this prayer was not new to this court which previously had ordered differently in the case of **DPP vs Solio Toroge**, Criminal Appeal No. 23 of 2023. He argued, so far as respondents were convicted to both offences, to return cattle to them, according to him, defeats criminal justice in our country.

On the second ground it was his submission that the duty of prosecution was to prove the offence and the issue of disturbance to natural vegetation was not among the facts on the first count the same was raised by the trial Magistrate while sentencing. He was of the position that the trial Magistrate could invoke section 320 of Cap 20 to order for more submission by prosecution so as to assist court to determine on this issue, he complained, on the base of the order of the trial Magistrate to return

cows to respondents. He maintained that prosecution was not heard and cited Article 13 of the Constitution of United Republic of Tanzania of 1977 and the case of **Suba Agro-Trading and Engineering Company Ltd & Another vs Seedco Tanzania Limited**, Civil Appeal No. 184 of 2020 CAT at Arusha; relying in **Matiko Chandruku @ Kehu vs Republic**, Criminal Appeal No. 139 of 2020 he maintained that trial Magistrate was supposed to call sentencing enquiry. He prayed their appeal to be found with merit.

Resisting the appeal, respondent hired Mr. Paul Mng'arwe, learned advocate submitted that in charge sheet, prosecution prayed the trial court to utilize only two legislations; National Park Regulation, GN 50 of 2002 specifically regulation 20 to be used to punish respondents and section 29 (2) of Cap 282. He explained that the section as listed in the charge sheet use the word 'may' that the trial court if finds fit may order forfeiture contrary to what has been submitted by State Attorney that the section use word 'shall'. Explaining further on the word shall, Mr. Mng'arwe said the word shall was used after forfeiture that if cattle has been forfeited, then, the said cattle shall be received by the Government and not otherwise. He was of the position that the provision gave description to the court and was wisely utilized and warned that the discretion as utilized may not be

challenged by superior courts as was in **TCCIA vs Dr. Gideon Kaunda**, Civil Appeal No. 310 of 2019 CAT Dar es salaam and **Shigela Mazudi and 5 Others vs Republic**, Criminal Appeal No. 16 of 2023. Mr. Mng'arwe distinguished the case of **DPP vs Solio Toroge** (supra) that there was option to the court on sentencing.

On the second ground of appeal, he was brief that the issue of natural vegetation has been explained in the second count and that the State Attorney is misleading this court as the same was not raised *suo motto*. It was his submission that nobody on prosecution side testified on the second count but trial Magistrate favored prosecution by ordering punishment. He prayed this court to find the appeal is less merit and dismiss it.

During rejoinder, Mr. Isihaka submitted that the issue of favour by trial Magistrate was supposed to be ground of appeal and not argued in the way counsel for respondent submitted. He maintained that, section 29 (2) of Cap 282 has the word shall and pray this court to read the section in totality and the discretion of the court may be interfered under the principle of stare decisis. Submitting on the case of **TCCIA vs Dr. Gideon Kaunda** (supra) he said the case provide conditions on when to interfere with utilization of discretion as there was wrong principle and some facts

were not taken into consideration that's why this appeal was filed. He prays his appeal to be found with merit.

As narrated, this court is tasked to determine whether forfeiture is mandatory as provided under section 29 (2) of Cap 282. For easy of reference, I shall reproduce it hereunder;

*'29 (2) Where any person is convicted of an offence against this Act or any regulations made thereunder, **the court may order that any animal, weapon, explosive, trap, poison, vehicle or other instrument or article made use of by such person in the course of committing the offence shall be forfeited to the Government.**'*

State Attorney submitted that forfeiture is mandatory as there is a word shall. Counsel for the respondents said the court has discretion on forfeiture and upon utilizing it, then the property so forfeited shall be received by the Government. Reading the excerpt above, I find the court has discretion to order forfeiture. The mandatory term is on the property which was forfeited just as submitted by Mr. Mng'arwe. The section was also interpreted by this court (Mtwara Registry) before R. A. Ebrahim J. in **Shigela Mazudi and 5 others vs Republic** (supra) at page 8 that;

'Indeed, section 29 (2) of the National Parks Act allows the court to order the forfeiture of the domestic animals entered into the National

Park to the Government. The powers are discretionary. I agree that discretionary powers should be exercised judiciously....'

In that case, the trial court ordered fine and forfeiture and while protesting the appeal that fine was already paid and cows were prayed in appeal to be released, State Attorney in that case (Ms. Kono) submitted that the word may in section 29 (2) of Cap 282 means the court has discretion and the first appellate court had the same position.

In the appeal at hand, the trial Magistrate convicted respondents in both counts and punished them in both counts. On the first count each respondent was ordered to pay fine to the tune of 10,000/ or one year imprisonment. On the second count each respondent was sentenced to pay fine to the tune of 5,000,000/ or three years jail imprisonment. 452 cows and 5 new born calves were released.

What I find in the currents appeal is that, respondents (then accused) were convicted and sentenced on both counts. The sentence was in accordance to section 25 of the Cap 16. Punishment under the cited provision range from 25 (a) up to (f) but Mr. Isihaka State Attorney opted for (e) on forfeiture. As explained in a short while, forfeiture which appears in section 29 (2) of Cap 282 is an option and Cap 16 provide a range of punishment

to be inflicted by a court. The trial Magistrate opted for what he finds fit. I have to respect his findings and discretion so far as am satisfied that no law was violated and he utilized his discretion wisely by using common sense and wisdom. See **Shigela Mazudi and 5 Others vs Republic** and **TCCIA vs Dr. Gideon Kaunda** (supra).

I subscribe to the case of **Xavier Sequeira vs Republic** (supra) as cited by Mr. Isihaka State Attorney that punishment is targeted to be a lesson to convict. And there is a list of punishment to be inflicted and things to be considered while sentencing, respondents in this appeal were punished. The case of **DPP vs Solio Toroge** (supra) as relied by Mr. Isihaka is distinguishable to the appeal at hand on the sense that in the case of **DPP vs Solio Toroge** (supra) the trial Magistrate did not convict respondent and therefore he was not punished. The 1st appellate court in that case which is this court (Musoma Registry) found respondent guilty of an offence, convicted as charged and proceeded to sentenced the respondent and provided an order for cows. In the case at hand the trial Magistrate convicted respondents and sentenced them and provide an order for cows.

Coming to the second ground, Mr. Isihaka was of the submission that being State Attorney, their duty was to prove the offence and the issue of

disturbance to the habitat of component of biological diversity (disturbing natural vegetation) was raised by trial Magistrate *suo motto* while sentencing respondents. He was of the position that the same was not in the first count. Mr. Mng'arwe maintained that it was in second counts and prosecution decided not to testify on that. For easy of reference, I find prudent to reproduce charge sheet;

2nd COUNT

STATEMENT OF OFFENCE

DISTURBING THE HABITAT OF THE COMPONENT OF BIOLOGICAL DIVERSITY: contrary to section 188 (c), 66, 67, 68 and 193 (1) (a), (b) and (2) of the Environment Management Act, No. 20 of 2004.

PARTICULARS OF OFFENCE:

MAGEMBE S/O MBUNDA @MALONGO and MASHAKA GIGITA @NYANGAKA on the 2nd day October 2023 at Mbuga za Rwashangi area into Serengeti National Park within Bunda District in Mara Region, unlawful disturbed the habitat of component of biological diversity to wit: Flora and Fauna by introducing domestic animals to wit: Four hundred and fifty two (452) cows into Serengeti National Park.

Dated at Bunda this 5th day of October 2023.

signed

STATE ATTORNEY

Reading charge sheet specifically at the second count, I find disturbing the habitat of the component of biological diversity is independent count in the charge levelled against the respondents (then accused). It was not a new thing raised by trial Magistrate as raised by Mr. Isihaka. While sentencing respondents, the trial Magistrate at page 8 of his judgment write and I quote;

'As the extent of disturbance to the habitat of component of biological diversity caused by accused persons is not displayed by prosecution evidence, I do not see any justifiable reason to order forfeiture to Government 452 cows and 5 new calves under section 29(2) of Cap 282. As a result, I order immediate release of 452 cows and 5 new born calves to accused persons.'

I find the trial Magistrate decision based on failure by prosecution to display disturbance on Flora and Fauna. It is clear that the issue of disturbance to the habitat of component of biological diversity (disturbing natural vegetation) was to be proved as it was in independent count. I have gone through prosecution testimony in trial court proceedings and

find nothing was testified concerning natural vegetation (Flora and Fauna) (disturbance to the habitat of component of biological diversity). However, the trial Magistrate reasoned that introduction of 452 cow into National Park has direct negative impact in the area but it was not established dimension and extent of the effect.

The question is, was it a proper issue to invoke section 320 of Cap 20? The answer is in negative because it was supposed to be proved by prosecution while making their case. It was not *by the way* issue, rather it was a charge and prosecution duty are bound to prove charge against the accused. This being a criminal case, Prosecution were supposed to prove the offence beyond reasonable doubts as per section 3 (2) (a) of the Evidence Act, Cap. 6 R.E. 2022 that;

'A fact is said to be proved when- (a) In criminal matters, except where any statute or other law provides otherwise, the court is satisfied by the prosecution beyond reasonable doubt that the fact exists;'

The same has been amplified in plethora of authorities including **Anatory Mutafungwa vs. Republic**, Criminal Appeal No. 267 of 2010, Court of

Appeal of Tanzania and **Festo Komba vs. Republic**, Criminal Appeal No. 77 of 2015, Court of Appeal of Tanzania (both unreported).

I am of the position that, it was not for the trial Magistrate to remind prosecution of the charge they left without proving. Just as submitted by Mr. Mng'arwe for respondents, it was prosecution who decided not to argue on that issue and note that it was not among the charge. I find no need to fault the trial Magistrate by concluding that prosecution failed to display the same during trial. Basing on section 3 (2) (a) of Cap 6 above cited, prosecution was supposed to prove charge and the trial court found it was not proved. I too of the same position that the issue of vegetation or flora and fauna or disturbance to the habitat of component of biological diversity not only that was not proved, but also was not discussed at all by prosecution witnesses. This was not the issue fit to invoke section 320 of Cap 20. See **Magembe Mbunda and Another vs. DPP**, Criminal Appeal No. 100 of 2023.

From the analysis above I find both grounds of appeal are devoid of merit and the appeal is hereby dismissed.

It is so ordered.

Dated at **MUSOMA** this 09th Day of November, 2023.



NK
M. L. KOMBA
JUDGE

Right of Appeal explained.

Judgement Delivered today in chamber in the presence of Mr. Jonas Kivuyo and Joyce Matimbwi who representing Director of Prosecution and both respondents were present in person.

NK
M. L. KOMBA
JUDGE

09 November, 2023