

THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
MBEYA SUB - REGISTRY
AT MBEYA
CRIMINAL APPEAL NO. 178 OF 2023

(Originating from the district court of Mbozi at Vwawa in Economic Case No. 10 of 2021)

FROLENCE JEREMIAH NYEMBE APPELLANT

VERSUS

REPUBLICRESPONDENT

JUDGMENT

Hearing date: 19/3/2024

Date of judgment: 7/5/2024

NONGWA, J.

At the District Court of Mbozi at Vwawa in Economic Case No.10 of 2021, the appellant was charged with three counts of unlawful possession of Government trophies contrary to section 86(1) and (2) (c) (ii) of the Wildlife Conservation Act of 2009 (the WCA) read together with paragraph 14 of the First Schedule to, section 57(1) and 60(2) both of the Economic and Organized Crime Control Act [Cap. 200 R: E 2019] (the EOCCA).

The particulars of the offences as per the charge sheet were that, on 11th day of July, 2021 at Gua Village within Songwe district in Songwe region the appellant was unlawfully found in possession of government

trophies first, 3.5 kilogram of buffalo meat, 02 ears and 01 tail of buffalo all valued at USD 1990 equivalent to Tsh. 4,406,100/= second, 199 cortex of armadillo valued at USD 960 equivalent to Tsh 2,226,240/= and third, 2 horns of warthog valued USD 450 equivalent to Tsh. 1,043,550/= the property of the United Republic of Tanzania, without permit from the director of Wildlife.

Initially the appellant did not plead to the charge for being economic offences. On 07/02/2022 consent to try the appellant and certificate to confer jurisdiction on the subordinate court was filed and received by the court. The charge was then read over to the appellant who pleaded not guilty to all three counts.

The prosecution case was supported by seven (7) witnesses, namely, Frank Joseph Matiko (PW1), Ahmed Omary Athuman (PW2), Jackson George Mshana (PW3), H. 9028 DC Aidan (PW4), Casto Laiton (PW5), G.5617 D/CL Magele (PW6), H8796 DC Mbezi (PW7). In addition, four piece of ivory and five documentary exhibits, that is valuation report, certificate of seizure, caution statements of the appellant, inventory form of meat and exhibit register were tendered and admitted.

It was the prosecution evidence of PW1 and PW3 wildlife officers testified that on 10/07/2021 received information from the informer that

there was a person involved in hunting wild animals. On 11/07/2021 night they went at Gua to the house of the appellant accompanied by leader of that area, they knocked the appellant's house and introduced themselves. They searched the house and found 199 cortex of armadillo, horn of warthog, buffalo meat 2 buffalo tail, 1 buffalo tail and seized them, they filed the certificate of seizure and signed together with the appellant. That the appellant admitted to possess those government trophies. PW2 the wild officer on 21/7/2021 conducted valuation of the government trophies brought to him by Magele.

On his part PW4 was tasked to record the statement of the appellant which he did after the accused was informed of all his rights. PW5 the ward executive officer assisted the police to go and search the house of the appellant and also signed certificate of seizure. Evidence of PW6 was that he took buffalo meat measuring 3.5 kilogram together with the appellant to magistrate for purpose of destruction of the meat. The destruction form was filled and signed also by the appellant. Last was PW7 exhibit keeper at Mkwajuni police station, he testified that on 11/07/2021 at 15:00 received exhibits from Magele for keeping and the same were recorded in exhibit register.

In defence the appellant was the only witness who sworn and stated that the items he was arrested with were not his as the case was planted. That he was taken by wildlife to forest and then to police and finally to court.

At the conclusion of the trial, the trial magistrate evaluated the evidence for both sides and was fully satisfied that the appellant was guilty of the offences charged, convicted and sentenced to twenty (20) years imprisonment in each count.

Dissatisfied with the conviction and sentence meted by the trial court, the appellant has filed a petition of appeal containing seven grounds of appeal which I will not reproduce them here for the reason which will become apparent later.

When the appeal came for hearing the appellant appeared in person, unrepresented, whilst the respondent Republic was represented by Ms. Prosista, State Attorney. When the appellant was called on to submit on his grounds of appeal, he just adopted it to form part of his submission and prayed the appeal be allowed.

The state attorney did not support the appeal, in the first ground on contradiction of time the appellant was searched, admitted to be some contradiction but argued that it was minor which did not go to the root of

the case as it is impossible for a witness to recall each and every detail of the evidence. The case of **Deus Joshia Kilala @Deo vs Republic** Criminal Appeal No. 191 of 2018 CAT DSM was cited in support of the argument.

In the second ground that Mashinene was not called, it was submitted that that person was only mention by PW5, this alone state attorney said cannot be a reason for not believing other witnesses. It was added that the appellant did not cross examine the witness about the said Mashinene.

On failure to name the informer in ground three, state attorney submitted that it was not important as what was at issue was the appellant being found in possession of government trophies. Stated attorney added that per section 143 of TEA, it is credibility of witnesses and not number of witnesses which count.

On different case file numbers in ground four as testified by PW6 and PW7, it was submission of the state attorney that a sack with ref. MKW/IR/589/2022 is the one which was tendered in court without objection from the appellant.

In respect of fifth complaint that exhibit P1, P2 and P3 did not follow procedure of tendering it, the state attorney submitted that exhibits were

admitted in court in accordance with the law as laid in the case of **Robson Mwanjisi**.

In sixth ground that there was no inquiry for admission of exhibits, the state attorney submitted that it is not all objection which required inquiry to be conducted rather extra judicial statement and caution statement when its voluntariness is at stake. She added that caution statement was objected and inquiry was supposed to be conducted, this, state attorney said was not done thus liable to be expunged. However, insisted that the remaining evidence was strong enough to sustain conviction.

In last ground that prosecution case was not proved, the state attorney submitted that the case was proved beyond reasonable doubt.

From the above submissions and records of appeal, in the course of composing judgment noting that it was the economic case, I wanted to satisfy myself on issue of consent of the Regional Prosecutions Officer and certificate conferring jurisdiction to subordinate court to try economic offence if it was in compliance with the law. Thus, I re-opened the proceedings for the parties to address the court on;

1. Whether the consent issued by regional prosecution officer under section 26 (1) of the EOCCA while he was not the DPP was valid.

2. Whether the consent and certificate conferring jurisdiction was proper for not citing the provision of the WCA which the appellant was charged with.
3. If the issue above is answered in negative; what is the way forward.

Submitting on the points raised the appellant being a layman- had nothing to say over the issues raised.

On part of the state attorney, Mr. James Mwenda submitted to have gone through the records and noted that the consent of the Regional Prosecution Officer was issued under section 26(1) of the EOCCA a provision gives powers to the Director of Public Prosecution. That, on part of the Regional Prosecution Officers are supposed to act under section 26(2) of the EOCCA as such the state attorney approved that the certificate filed conferring jurisdiction to the trial court was not proper and therefore the court had no jurisdiction. As to the remedy he left to the court to decide.

Starting with the first issue relating power to issue consent under section 26 (1) and (2) of the EOCCA which provides;

'(1) Subject to the provisions of this section, no trial in respect of an economic offence may be commenced under this Act save with the consent of the Director of Public Prosecutions.

(2) The Director of Public Prosecutions shall establish and maintain a system whereby the process of seeking and obtaining of his consent for prosecutions may be expedited and may, for that purpose, by notice published in the Gazette, specify economic offences the prosecutions of which shall require the consent of the Director of Public Prosecutions in person and those the power of consenting to the prosecution of which may be exercised by such officer or officers subordinate to him as he may specify acting in accordance with his general or special instructions.'

The above provision has to be read together with the Economic Offences (Specification of Offences for Consent) Notice, 2021 G.N. No. 496H of 2021 published on 30th June, 2021, paragraph 3 which provides as follows with regards to delegation of power to issue consent:

'3(1) The prosecution of economic offences specified in this Notice requires the consent of the Director of Public Prosecutions and such consent may be issued by him in person.'

What is clear is that issuance of consent under section 26(1) of the EOCCA can only be exercised by the DPP, it is not delegable. In the case of **Peter Kongori Maliwa & Others vs Republic**, Criminal Appeal

No.252 of 2020 [2023] TZCA 17350 (14 June 2023; TANZLII) the Court stated that;

'In this case, consent was issued by the State Attorney In charge instead of the DPP. That was a serious irregularity as the power to issue a consent under section 26(1) of the EOCCA is not delegable, it is absolutely vested in the DPP himself. As such, the consent under discussion having been issued by a person without mandate was incapable of authorizing the trial court to try the economic offences.'

In another case of **Sandu John vs The Director of Public Prosecutions**, Criminal Appeal No. 237 of 2019 [2023] TZCA 17719 (4 October 2023; TANZLII) the court had this to say;

'... in the case under scrutiny, since the Prosecution Attorney In-charge purported to issue the consent under section 26 (1) of the EOCCA which was not within her mandate, it amounted to no consent at all authorising the prosecution of the appellant by the trial court.'

With the above law, I find that the consent which was issued by the regional prosecution officer of Songwe region under section 26(1) of the EOCCA was invalid for had no power to exercise power of the DPP and therefore incapable of authorizing the trial court to try the appellant on economic offences.

Advancing to the second issue, on consent and consent and certificate to confer jurisdiction not citing the provision of law creating the offence. For purpose of clarity the two documents are reproduced below;

CONSENT OF THE REGIONAL PROSECUTIONS OFFICER

'I, NJOLOYOTA B. MWASHUBILA, regional prosecutions officer of Songwe region, in terms of section 26(1) of the Economic and Organised Crime Control Act [Cap 200 R: E 2019] read together with G.N NO. 496H of 30th June, 2021, DO HEREBY CONSENT to the prosecution of FROLENCE S/O JEREMIAH NYEMBE for contravening the provision of paragraph 14 of the first schedule to, and section 57(1) and 60(2) of the Economic and Organised Crime Control Act [Cap 200 R: E 2019], the particulars of which are stated in the charge sheet.

signed at Songwe this 10 day 07 of 202

Signed

Njoloyota B. Mwashubila

REGIONAL PROSECUTIONS OFFICER

On the other hand, certificate read;

CERTIFICATE CONFERING JURISDICTION TO SUBODINATE COURTY TO
TRY AN ECONOMIC CASES

'I, NJOLOYOTA B. MWASHUBILA, regional prosecutions officer of Songwe Region, in terms of section 12(3) of the Economic and Organised Crime Control Act [Cap 200 R: E 2019 read together with G.N NO. 496H of 30th June, 2021, ORDER THAT FROLENCE S/O JEREMIAH NYEMBE who is charged for contravening the provision of paragraph 14 of the first schedule to, and section 57(1) and 60(2) of the Economic and Organised Crime Control Act [Cap 200 R: E 2019] BE TRIED BY THE DISTRICT COURT OF MBOZI DISTRICT AT VWAWA.

Dated at Songwe this 10 day 01 of 2022

Signed

NJOLOYOTA B. MWASHUBILA

Regional prosecution officer

Looking at both the consent of the regional prosecutions officer and certificate conferring jurisdiction to the trial court did not cite the provisions of the law under the Wildlife Conservation Act creating the respective economic offences which the appellant was charged with. In the case of **Kulwa Kashiki vs Republic**, Criminal Appeal No. 208 of 2021 [2023] TZCA 17928 (12 December 2023; TANZLII) the court was faced with the same issue and it held that;

'... the way the consent is drafted, there was no clarity on the specific offence the prosecution of the appellant had been consented against, thus rendering it valueless. Essentially, this

means that the appellant was prosecuted without the requisite consent. The same situation befell the certificate conferring jurisdiction to the District Court of Kahama to try the charge facing the appellant. In the absence of a proper description of the offence charged in the said certificate, it means the District Court of Kahama.'

[see also; **Malegi Shenye @ Lusinga vs Republic**, Criminal Appeal No.152 of 2020 [2023] TZCA 17394 (11 July 2023; TANZLII)]

From the above law, the consent to try the appellant and certificate conferring jurisdiction to the subordinate court were invalid for failure to cite the provisions and specific offence under the Wildlife Conservation Act the appellant was to be tried in the trial court. Paragraph 14 of the first schedule to the EOCCA refers to section 17, 19, 24, 26, 28, 47, 53, 103, 105, Part X or Part XI of the Wildlife Conservation Act or section 16 of the National Parks Act which has been made economic and the appellant was not charged with all those offences. The defects pointed rendered the trial court to lack jurisdiction over the matter to render the whole proceedings a nullity. I invoke revision power under section 373(1) of the Criminal Procedure Act (Cap 20 R: E 2022), and nullify the proceedings of the trial courts, quash the appellant's conviction and set aside the custodial sentence imposed on him.

As for the way forward, the state attorney left to the court to decide on the fate of the prosecution case. To decide whether retrial is appropriate order or not, test laid in the case of **Fatehali Manji vs The Republic** [1966] 1 EA 343 is paramount, the court stated that;

'In general, a retrial will be ordered only when the original trial was illegal or defective. It will not be ordered where the conviction is set aside because of insufficiency of evidence or for purpose of enabling the prosecution to fill up the gaps in its evidence at the first trial. Even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to be blamed, it does not necessarily follow that a retrial shall be ordered; each case must depend on its own facts and circumstances and an order of retrial should only be made where the interests of justice require.'

[See also; **Peter Kongori Maliwa & Others vs Republic**, Criminal Appeal No.252 of 2020 [2023] TZCA 17350 (14 June 2023; TANZLII) and **Salumu s/o Andrew Kamande vs Republic**, Criminal Appeal No. 513 of 2020 [2023] TZCA 133 (22 March 2023; TANZLII)].

I have gone through the record of appeal, prosecution evidence, grounds of appeal filed by the appellant and submission made by the state attorney, it is my view that retrial in this case will not be in the interest of justice due to the shortcomings found in the prosecution case. Search of

the appellant house was conducted without search warrant as required by section 106(1) of the WCA. This provision provides;

'Without prejudice to any other law, where any authorised officer has reasonable grounds to believe that any person has committed or is about to commit an offence under this Act, he may-

(a) require any such person to produce for his inspection any animal, game meat, trophy or weapon in his possession or any licence, permit or other document issued to him or required to be kept by him under the provisions of this Act or the Firearms and Ammunition Control Act;

(b) enter and search without warrant any land, building, tent, vehicle, aircraft or vessel in the occupation or use of such person, open and search any baggage or other thing in his possession:

Provided that, no dwelling house shall be entered into without a warrant except in the presence of at least one independent witness.'

Application of section 106(1)(b) of the WCA was discussed in the case of **Samwel Kibundali Mgaya vs Republic**, Criminal Appeal No. 180 of 2020 [2022] TZCA 342 (14 June 2022; TANZLII) in which the court held that;

'However, since the provisions of section 106 (1) of the WCA have expressly been made "without prejudice to any other law," it is our view that any search under the said law has to comply with the general law on investigation of crimes and criminal trials that is, the CPA.'

Under the Criminal Procedure Act [Cap 20 R: E 2022] (the CPA), section 38 govern search which is done **one;** with search warrant or search order, **two;** the presence of the owner of the premises, occupier or his near relative at the search premises, **three;** the presence of an independent witness who is required to sign to verify his presence and **four;** issuance of a receipt acknowledging seizure of property. Section 38 of the CPA is only in some circumstances not applicable when it is established that it was emergency search under section 42 of the CPA.

According to evidence of PW1 and PW3 they got information on 10/07/2021 that the appellant was possessing government trophies and on 11/07/2021 night they went to search the premises of the appellant. Looking at the circumstances of the case it cannot be said the search was an emergency one under section 42 of the CPA, this is because on 10/7/2021 when they got the information to 11/7/2021 at night hours when they decided to go and search the appellant compound, they had ample time to obtain search warrant or search order. Faced with the same

issue in the case of **Lukuman Said Laila vs Republic**, Criminal Appeal No. 551 of 2021) [2023] TZCA 149 (28 March 2023; TANZLII) the court held that;

'PW3 conducted the search in the appellant's room without any permission from his boss neither did he have any search warrant on a search which was not an emergency one in contravention of section 38 (1) and (3) of the CPA. Consequently, the search was as illegal as the seizure.'

The above applies to the present appeal, search by the wildlife officer PW1 and PW3 was conducted without search warrant or court order and the circumstance under which they got information of the appellant possessing government trophies did not fit under emergency search, thus search warrant was mandatory to be obtained first, this was not done making the search illegal.

Having declared that search was illegal, it follows that the trophies obtained in such search will not be spared because when it happens that a search was illegal for not observing the provision of the CPA, the exhibits recovered become automatically evidence illegally obtained. On this I am guided by the case of **Ngasa Tambu vs Republic**, Criminal Appeal No. 168 of 2019 [2022] TZCA 455 (21 July 2022; TANZLII) in which the court held that;

'For the exhibits recovered based on a search warrant, a search warrant must be legally tendered and pass all tests such that it should not suffer any threats or real expungements from the record. If it happens that a search warrant is expunged like it has happened in this case, the exhibits recovered become automatically evidence illegally obtained The point we want driven home is that, as long as the search warrant has been expunged, whatever was recovered by using it without observing the provisions of the CPA referred to above, became illegally procured evidence which cannot be used by any court to convict any person.'

In this appeal the search which lead to the recovery of the armadillo meat, buffalo meat which was destroyed as per exhibit P4, together with exhibit P5A-D was illegal for not observing the requirement of section 38 of the CPA. With that finding, it becomes clear that seizure certificate exhibit P2 and valuation report exhibit P1 becomes of no any purpose and liable to be expunged. Having expunged all exhibits it becomes apparent that the charge of unlawful possession of the government trophies which was facing the appellant cannot be sustained.

Assuming, the search was in the order, still there are other shortcomings, one, Chain of custody in this case was not explained from when it was seized to tendering in court, for instance, items were seized at 01.04 as per certificate of seizure by PW1 but it was until 15:00hrs

when it was handed to PW7 by PW6 who was not a seizing officer or the investigation officer of the case, his evidence was only in regard to taking meet for destruction to magistrate. The lapse of time from its seizure on 11/10/2021 at 01:04AM to handing to storekeeper at 15:00hrs, there is interval of 14hrs and there is no evidence how those items changed hands from the seizing officer PW1 to PW6 who was not the investigation officer. In the circumstances, there was no guarantee that exhibit P5A to P5D which was tendered in court was the same item as that which was alleged to have been found with the appellant on the date mentioned in the charge sheet.

Two, destruction of trophies was contrary to section 101 (1) of the WCA and paragraph 25 Police General Orders (PGO) 229, there was no proceeding of the court on disposal and the same was conducted in absence of the appellant as inventory form, exhibit P4 is not signed by him and no photograph before destruction was tendered. See **Idd Hamis vs Republic**, Criminal Appeal No. 119 of 2022 [2024] TZCA 67 (20 February 2024; TANZLII).

Three, trophies seized were not proved, distinctive features of the items recovered from the appellant was not stated by prosecution witness apart from giving generalized evidence. In **William Maganga @ Charles**

vs Republic, Criminal Appeal No. 104 of 2020 [2023] TZCA 17742 (6 October 2023; TANZLII) the court stated;

'... In wildlife conservation related cases, identification of a particular specie of the animal affected or part of it in relation to an offence charged, is a matter of considerable significance. That aspect of the case, is provable by tendering a properly filled in Trophy Valuation Certificate, which is a standard form document created under the Wildlife Conservation (Valuation of Trophies) Regulations 2012, (Government Notice No. 207 of 2012). Tendering of that certificate must go hand in glove with a proper explanation of a wildlife expert detailing the distinctive features of a given animal. Such oral explanation or description may be based on animal science or the witness's experience in wildlife conservation and management..'

In this appeal PW1 tried to explain to the differences between the wild animals and domestic but he did not explain his animal expertise in dealing with wild animal parts. To the contrary PW2 who was the expert in the field his evidence confined to evaluating and tendering evaluation certificate without explaining how he concluded that it was wild animal parts.

The pointed shortcomings in the prosecution case vindicates that the prosecution case against the appellant was not proved and if retrial is ordered it will enable them to fill up gaps in its evidence during trial. In

the final result, I order the immediate release of the appellant FROLENCE S/O JEREMIAH NYEMBE from prison custody unless held there for some other lawful cause.



A handwritten signature in blue ink, appearing to read "V.M. Nongwa".

V.M. NONGWA
JUDGE
7/5/2024

DATED and DELIVERED at MBEYA this 7th day of May, 2024 in presence of the appellant and Mr. Stephen Rusibamaila-State Attorney.

A handwritten signature in blue ink, appearing to read "V.M. Nongwa".

V.M. NONGWA
JUDGE