

**IN THE COURT OF APPEAL OF TANZANIA
AT IRINGA**

(CORAM: MBAROUK, J.A., MASSATI, J.A., And ORIYO, J.A.)

CRIMINAL APPEAL NO. 332 OF 2008.

1. NICO S/O MHANDO
2. FERI S/O MAGUBIKA
3. DAMAS S/O MAGOVA } APPELLANTS

VERSUS

THE REPUBLIC RESPONDENT

**(Appeal from the decision of the High Court of Tanzania
at Iringa)**

(Mkuye, J.)

dated 17th day of September, 2008.

in

Criminal Appeal No. 5 of 2008

RULING OF THE COURT

19th & 26th March, 2012.

ORIYO, J.A.:

The appellants, Nico s/o Mhando, Feri s/o Magubika and Damas s/o Magova were jointly charged and convicted in the District Court of Iringa, of Armed Robbery contrary to sections 285 and 287A of the Penal Code. The third appellant was also charged and convicted of two other counts of unlawful

possession of arms and ammunition contrary to sections 4(1) and 34(2) of the Arms and Ammunition Act No. 2 of 1991. The respective charges as they appear in the Charge Sheet dated 6/11/2006 were as follows:

"1ST COUNT:

STATEMENT OF THE OFFENCE:- Armed Robbery c/s 285A of the Penal Code Cap 16 of the laws.

Particulars of the Offence:- That Nico s/o Muhando, Feri s/o Magubika, Damasi s/o Magova and Heri s/o Magubika are jointly and together on 22th (sic) day of September, 2006 at about 00.30hrs at Ifua village within the District of Kilolo in Iringa Region did steal cash money 1030,000/= the property of Bonifance s/o salime and immediately before or after such stealing did threaten to kill by using a gun in order to obtain the said property.

2ND COUNT:- FOR 3TH (sic) ACCUSED:

STATEMENT OF OFFENCE:- Unlawful possession of fire arm contrary to section 4(1) and section 34(2) both of the arms and Ammunition Act 2 of 1991.

PARTICULARS OF OFFENCE:- That Damasi s/o Magova charged on 22th (sic) day of September,

2006 at about 21.00hrs at Ifua village within the District of Kilolo in Iringa Region were (sic) found in unlawful possession of two Muzzle loades (sic) without any permit.

3RD COUNT FOR 3TH (sic) ACCUSED:

STATEMENT OF OFFENCE:- UNLAWFUL possession of Ammunition contrary to section 4 (1) and section 34 (2) both of the arms and Ammunition Act 2 of 1991.

PARTICULARS OF THE OFFENCE:- That the above said Accused persons (sic) on the aforementioned date, time and place were (sic) found in unlawful possession of one Ammunition of short (sic) gun without any permit.

STATION – IRINGA

(signed)

.....

PUBLIC PROSECUTOR

DATE: 6/11/2006."

At the end of the trial, they were each convicted as charged and, each was sentenced to 30 years imprisonment on the first count. The third accused was in addition sentenced to one year imprisonment on each of the counts two and three.

Aggrieved by the convictions and sentences, the appellants lodged an appeal in the High Court. Their convictions and sentences for the offences were upheld by the High Court, sitting at Iringa.

Still aggrieved, the appellants have come to this Court. When the appeal was called on for hearing, Mr. Faraja Nchimbi, learned Senior State Attorney appeared for the respondent/Republic and Mr. Basil Mkwata learned counsel appeared for the first appellant.

The second and third appellants were unrepresented, they appeared in person.

Before embarking on the merits of the appeal, the Court, **suo motto** invited parties to submit on the legality and competence of the proceedings in the trial District Court where the trial was on a combination of economic offences and non-economic offences without the consent and certificate of the Director of Public Prosecutions (DPP).

Mr. Mkwata readily conceded that such proceedings were illegal. However, he was quick to add that since his client, the first appellant was not charged with the economic offences, his

appeal was legally before the Court and could proceed to hearing.

On the other hand, Mr. Nchimbi, learned Senior State Attorney, was of a different view. He submitted that in the absence of the DPP's consent and a certificate of transfer, the trial District Court had no jurisdiction to try the offences and it rendered the proceedings a nullity. He prayed for a retrial.

In disposing of the matter before us, we have found it appropriate to discuss the relevant law as it was on 25th September, 2006, when the offences were allegedly committed by the appellants.

The appellants were jointly charged as per the charge sheet under the Penal Code for Armed Robbery on the first count. On the second and third counts, the third appellant, Damas Magova, was charged with unlawful possession of firearm and unlawful possession of ammunition under the Arms and Ammunition Act No. 2 of 1991, Cap 223, R.E. 2002. When the Arms and Ammunition Act was enacted in 1991, there was an earlier law in existence, the Economic and Organised Crimes Control Act, Cap 200, R.E. 2002, (Economic Crimes Act). Under Paragraph 19 to the First Schedule of the Economic Crimes Act,

the offences of Unlawful Possession of arms and ammunition were already listed as economic offences under the Economic Crimes Act. And until 21/3/2007, when the appellants were convicted and sentenced by the Iringa District Court, the offences still remained economic offences under the Economic Crimes Act, because they were yet to be delisted by an Act of Parliament, (see section 57(2), Cap.200). That was the legal position when the appellants were arrested and charged in 2006, tried and eventually convicted and sentenced in 2007, the offences of unlawful possession of arms and ammunition were economic crimes and were only triable by the High Court, which was the Economic Crimes Court.

Therefore, before commencing the prosecution of the appellant in the District Court of Iringa, prior consent of the Director of Public Prosecutions was mandatory under section 26(1) of the Economic Crimes Act which states:-

"26.-(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."

wrong for the offences to be combined in one Charge Sheet as it appears above. It is in this respect that we agree with the learned Senior State Attorney that at the time the appellants were charged in the District Court of Iringa, that court had no jurisdiction to try the offences in the absence of the DPP's consent given under section 26(1) and a certificate of transfer issued under section 12(3) of the Economic Crimes Act.

In view of the clear legal position stipulated above, it is evident that the offences in the second and third counts were still scheduled offences at the time of their prosecution in the District Court of Iringa. In the circumstances, the consent of the DPP to prosecute together with a certificate of transfer to the District Court were mandatorily required. Otherwise, in the absence of such consent and certificate, the trial District Court lacked the requisite jurisdiction and hence the entire proceedings were a nullity.

In the case of **Rhobi Marwa Mgare and Two Others vs Republic**, Criminal Appeal No. 192 of 2005 (unreported), in similar circumstances, the Court held:-

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No. 151 of 2009; **Dotto s/o Salum @ Butwa v. Republic**, Criminal Appeal No. 5 of 2007 (all unreported).

In the exercise of our revisional powers under section 4(2) of the Appellate Jurisdiction Act, Cap 141, R.E. 2002, we quash the lower court's proceedings and set aside the sentences.

The learned State Attorney prayed for a retrial. With greatest respect to Mr. Nchimbi, we are not ordering a retrial. Article 59B (2) of the Constitution of the United Republic of Tanzania provides:-

"The Director of Public Prosecutions shall have powers to institute, prosecute and supervise all criminal prosecutions in the country."

In terms of Article 59B (2) above, the Director of Public Prosecutions is bestowed with vast powers over criminal prosecutions in Tanzania.

Further, sub article (5) of Article 59B sets out three basic considerations to be taken into account by the Director of Public Prosecutions in the exercise of his powers:-

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(a) the need for dispensing justice;

- (b) *prevention of misuse of procedures for dispensing justice; and;*
- (c) *public interest."*

In view of the vast powers bestowed on the Director of Public Prosecutions under Article 59B, we have decided to leave the matter with the Director of Public Prosecution to decide on whether to mount a fresh prosecution or not. In the meantime, we order the immediate release of the appellants from custody unless otherwise lawfully held.

DATED at **IRINGA** this 23rd day of March, 2012.

M. S. MBAROUK
JUSTICE OF APPEAL

S. A. MASSATI
JUSTICE OF APPEAL

K. K. ORIYO
JUSTICE OF APPEAL

I certify that this is a true copy of the Original.



A handwritten signature in black ink, appearing to read "J. S. Mgetta".

(J. S. Mgetta)
DEPUTY REGISTRAR
COURT OF APPEAL