IN THE COURT OF APPEAL OF TANZANIA

AT IRINGA

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

CRIMINAL APPEAL NO. 272 OF 2007.

1. ELIAS VITUS NDIMBO
2. ERASTO NCHIMBI } **..... APPELLANTS**

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Judgment of High Court of Tanzania at Songea)

(Uzia, J.)

dated 6th day of August, 2007.

in

Criminal Appeal No. 7 of 2007

RULING OF THE COURT

26th & 28th March, 2012.

ORIYO, J.A.:

In Criminal Case No.84 of 2006, in the District Court of Mbinga sitting at Mbinga, the appellants, Elias Vitus Ndimbo and Erasto Nchimbi, were charged with three offences. In the first count, they were charged with Armed Robbery, contrary to

sections 285 and 286 of the Penal Code. In the second count, they were charged with unlawful possession of firearms contrary to sections 4(1)(a) and 34 of the Arms and Ammunition Act, 1991. In the third count, they were charged with being in unlawful possession of ammunition contrary to sections 4(1)(a) and 34 of the Arms and Ammunition Act, 1991.

Upon conviction on the 21st December, 2006, they were each sentenced to thirty years imprisonment and twelve strokes, on the first court. On the second and third counts they were sentenced to fifteen years imprisonment for each count, and the sentences were to run concurrently.

They were aggrieved and lodged an appeal to the High Court. On 6th August 2007, the High Court sitting at Songea dismissed their appeal. They have now come to this Court each

with several complaints against the first appellate court's decision.

Before us, the appellants appeared in person. The respondent/Republic was represented by Ms. Andikalo Msabila, learned Principal State Attorney. The appellants being laymen preferred that the Republic submits first on the grounds of appeal and they would follow in reply.

Ms. Msabila began by addressing us on what she termed as legal problems apparent in the charge sheet and in the trial in general. She contended that in the charge sheet and during the proceedings in the trial district court of Mbinga, there was a combination of economic offences and non-economic offences. She submitted that both the charge sheet and the trial proceedings were illegal and a nullity because in terms of the provisions of the Economic and Organised Crimes Control Act,

(Economic Crimes Act) the second and the third counts were scheduled offences and required the consent of the Director of Public Prosecutions to prosecute. She further submitted that since under the Economic and Organised Crimes Act, the jurisdiction to try economic crimes was solely vested with the High Court, the trial District Court had no jurisdiction to hear the case unless the Director of Public Prosecutions issued a consent and a certificate of transfer which would vest the trial District Court with jurisdiction.

Ms. Msabila invited us to exercise the Court's powers under Section 4(2) of the Appellate Jurisdiction Act to revise the proceedings in the courts below and make appropriate orders.

On the second and third counts, the appellants were convicted under section 4(1) of the Arms and Ammunition Act, which provides:-

"No person shall use, carry or have in his possession or under his control any firearms or ammunition, except in a public or private warehouse unless he is in a possession of an arms licence issued under this Act".

Before the Arms and Ammunition Act No. 2 of 1991 was enacted, the Economic Crimes Act was already in place and the offences of unlawful possession of arms or ammunition were already listed as economic offences. Therefore, when the appellants were charged with unlawful possession of arms and ammunition, the offences were still economic crimes in terms of the First Schedule of the Economic Crimes Act. By paragraph 19 of the First Schedule, thereof it provides:

"A person is guilty of an offence under this paragraph who is found in unauthorized possession of arms or ammunition contrary to the provisions of the Arms and Ammunition Act".

That was the legal position in the year 2006 when the appellants were charged, tried and convicted in the District Court of Mbinga in 2006. Both legislations, the Economic Crimes Act Cap.200, R.E.2002 and the Arms and Ammunition Act, Cap.223, R.E.2002, **criminalized the unlawful possession of arms and ammunition.**

In the circumstances obtaining in 2006, before commencing the prosecution of the appellants in the District Court of Mbinga, a prior consent of the Director of Public Prosecutions had to be obtained in terms of section 26(1) of the Economic Crimes Act, which provides:-

> *"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".*

Section 3(1) of the Economic Crimes Act, vests the High Court with the jurisdiction over economic crimes. However, an economic crime may be prosecuted in a subordinate court where in addition to obtaining the **consent** of the Director of Public Prosecutions to prosecute, a **certificate of transfer** to try the offence in a subordinate court is issued under **section 12(3)** of the Economic Crimes Act. **Section 12(4)** thereof vests the Director of Public Prosecutions with authority to **sanction a prosecution of combination of economic and non economic offences in a subordinate court**, as in this case.

On our part, in view of the clear legal position at the time when Criminal Case No.84 of 2006 was prosecuted in the District Court of Mbinga without a consent and a certificate of transfer issued by the Director of Public Prosecutions, it is undisputed that the trial court had no jurisdiction to try the appellants on the second and third counts. We therefore agree with Ms.

Msabila, that the trial by the District Court was illegal for lack of jurisdiction. The proceedings, convictions and sentences in the trial court and in the first appellate court were illegal and a nullity, **See** for instance, the cases of **Rhobi Marwa Mgare and Two Others v R**, Criminal Appeal No.192 of 2005, **Amri Ally @Becha vs R**, Criminal Appeal No. 151 of 2009, **Samwel Mwita v R**, (consolidated Criminal Appeal Nos.34, 35, 36, and 66 of 2009; **Kaganda John & Anor v R**, Criminal Appeal No. 356 of 2009; **Dotto Salum @Butwa vs R**, Criminal Appeal No. 5/2007; **Nicco Mhando & 2 Others v R**, Criminal Appeal No. 332 of 2008 (all unreported).

In the event, we invoke the Court's revisional powers provided under section 4 (2) of the Appellate Jurisdiction Act, Cap.141, R.E.2002, to quash the proceedings in the courts below and set aside the sentences. As to whether the appellants are to be subjected to a retrial or not, we leave it to the discretion of

the Director of Public Prosecutions in the exercise of his powers under Article 59B(2) of the Constitution of the United Republic of Tanzania, Cap.2, R.E.2002.

However, in the meantime, we order the immediate release of the appellants from custody unless otherwise lawfully held.

DATED at **IRINGA** this 28th 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.

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