IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

(CORAM: RUTAKANGWA, J.A., MJASIRI, J.A., And JUMA, J.A.)

CRIMINAL APPEAL NO. 270 OF 2010

1. **CRETUS SAMBI@KIMBWENGA**
2. **GEOFREY CHAZYA** } ..... **APPELLANTS**

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the Judgment of the High Court of

Tanzania at Sumbawanga)

(Khaday, J.)

Dated the 17th day of September 2010
in
DC Criminal Appeal No. 40 of 2009

.....

JUDGMENT OF THE COURT

6th & 10th June 2013

JUMA, J. A.:

The appellants, CRETUS SAMBI KIMBWENGA and GEOFREY CHAZYA were tried and convicted by D.A. Magezi the learned Resident Magistrate at the District Court of Mpanda in Economic Case No. 22 of 2007. They were convicted on a single count of being in unlawful possession of Government Trophy without having a valid permit. This was contrary to paragraph 15 (d) of the First Schedule

to, and section 59 (2) of the Economic and Organized Crimes Control Act, Cap. 200 RE 2002 (hereinafter referred to as "Economic Crimes Act").

According to the particulars of the offence, the two appellants and six other co-accused, around 23.00 hrs on 24th June 2007 at Kibaoni Village in Mpanda District, were jointly and together found in possession of twenty (20) kilogrammes of elephant meat and ten (10) elephant tusks all valued at Tshs. 36,000,000/=. This possession was unlawful, because the meat and the tusks were the property of the Government of Tanzania, and they had not obtained any valid permit therefor. On February 18, 2009, appellants were sentenced to pay a fine of Tshs. 50,000/= each, or to serve a sentence of five years in prison in case of default to pay the fine. Appellants opted to pay the fine.

Dissatisfied with the sentence, the Director of Public Prosecutions (DPP) appealed to the High Court of Tanzania at Sumbawanga (DC Criminal Appeal No. 40 of 2009). Specifically, the DPP complained that the learned trial magistrate should have imposed a minimum prescribed sentence of twenty (20) years

imprisonment, and not a fine of Tshs. 50,000/= or five years prison sentence in default. The High Court (Khaday, J.) agreed as much with the position taken by the DPP. Citing section 70 (2) of the Wildlife Conservation Act, 1974 Cap. 283 RE 2002 (hereinafter referred to as **Wildlife Act**), the learned Judge observed that having convicted the two appellants of the economic offence, the trial court should have imposed a statutory prison sentence for a term of not less than twenty years, in addition to a fine. The High Court substituted the sentence with one of twenty (20) years term of imprisonment. In so far as the 1st appellant is concerned, the first appellate court ordered this sentence was to be computed from 18th May 2008 to take into account the days he had already stayed in custody. For the 2nd appellant who had absconded, his 20 years imprisonment sentence would run from 15th February 2009.

Aggrieved by the decision of the first appellate court on sentence, the two appellants lodged this appeal, each filed separate memorandum of appeal albeit identical in their contents. Although the decision of the High Court as a first appellate court was restricted to illegality of the sentence the trial court had imposed, the

appellants' grounds of appeal to this Court went beyond complaint over sentence. They in addition contested their conviction by the trial court, which was not the subject of the DPP's first appeal at the High Court. For instance, appellants contend that the charge of unlawful possession of the Government Trophies leveled against them was not proved beyond reasonable doubt. While the first appellant still contends that he is not the owner of the house where the Government Trophies were recovered; the second appellant questions the identification evidence.

The two appellants were however candid enough to admit that after their conviction by the trial court, they decided to waive their right to express their intention to appeal to the High Court because of the fine of Tshs. 50,000/= which the trial court had imposed. The second appellant in particular explained that the fine imposed by the trial court was of little value when compared with the trouble he would have to go through looking up for legal aid, judicial processes and time wasted following up on appeals.

The pertinent facts leading up to this second appeal are as follows. Around 22.00 pm on 24th June 2007, PW1, IDDI MLIMI, a

Katavi National Park Ranger, received a call from his departmental head. There was information from an informer suggesting that there was a person named CRETUS KIBWENGA (the first appellant) at Kibaoni who was in unlawful possession of elephant tusks. PW1 was instructed to go and carry out a search while his head of department went out to seek reinforcements from the police. It was around 23 pm when PW1; PW2, Staff Sergeant YUSUPH ELIAS; PW3, LEOPOLD KATABI (Kitongoji Chairman) and other law enforcement officers rounded up two houses belonging to the first appellant. The Park Rangers and the police broke into the first house after the occupants declined to let the police in. The first appellant managed to escape from the police trap but his wife was still in. In the house police found fresh and dried elephant meat which the first appellant's wife explained that it was her husband, who had brought it from Katavi National Park.

In the next main house, which was about fifteen metres from the first house, they searched and arrested the second appellant before he could escape. Inside they found ten elephant tusks buried under the ground in two different rooms.

In this appeal, the two appellants appeared in person unrepresented. Two learned State Attorneys, Mr. Prosper Rwegerera (a Senior State Attorney), assisted by Ms Scholastica Lugongo, represented the respondent Republic. At the hearing, the two appellants had nothing to expound over their grounds of appeal except to express their wonderment why the fine which they paid following their conviction, was not refunded now that they are serving terms in prison. On her part, Ms Lugongo, from the outset opposed the appeal for the main reason that that the appellants cannot in law appeal against their conviction by the trial court without first passing through the High Court. The learned State Attorney pointed out that in the circumstances of this appeal, where the appellants did not appeal against their conviction at the High Court, this second appellate court cannot step into the shoes of the first appellate court to re-evaluate evidence afresh to determine whether the appellants were properly convicted by the trial district court. She submitted that this second appeal should be restricted to issue of sentence.

141 RE 2002, Ms Lugongo submitted that the appellants have no automatic right of appeal to this Court against their conviction by the trial Court. She also pointed out that the offence for which the appellants were charged and convicted were in terms of section 70 (1) (c) (iii) of the Wildlife Act, and punishable with a minimum sentence of ten years imprisonment and a maximum sentence of 20 years in prison. In other words, the appellants were rightly sentenced by the High Court on first appeal. The relevant section 70 (2) (c) (iii) provides:

> ***70 (1)*** *No person shall be in possession of, or buy, sell or otherwise deal in any Government trophy.*
>
> *(2) Any person who contravenes any of the provisions of this section commits an offence and is liable on conviction–*
>
> *(a)...*
>
> *(b)..*
>
> *(c) in any other case–*
>
> *(i)..*
>
> *(ii)..*

(iii) where the value of the trophy which is the subject matter of the charge exceeds twenty thousand shillings, to imprisonment for a term of not less than ten years but not exceeding twenty years and the court may in addition to that impose a fine not less than one hundred thousand shillings nor more than ten times the value of the trophy, whichever is the larger amount.

Before we moved on to determine the merits of this appeal, we asked Ms Lugongo to also address us on a point of law regarding the legality of the District Court of Mpanda, a court subordinate to the High Court, to try an economic offence. In our perusal of the record of the present appeal, we only saw on page 2, CONSENT of the STATE ATTORNEY IN CHARGE. This consent is a mandatory requirement under section 26 (1) of the Economic Crimes Act before commencement of a trial of an economic offence. Certificate of a transfer, is another statutory document that is missing. This missing document would confer jurisdiction on a court subordinate to the High Court, to hear and determine an economic offence as a trial court. In other words, the record of the trial District Court and by

extension the record of this appeal lacks a Certificate under the hand of the DPP or State Attorney duly authorised by the DPP to transfer the trial of the Economic Case No. 22 of 2007 to the District Court of Mpanda.

Ms Lugongo magnanimously conceded that after a quick perusal, she was also for the first time noting the anomaly of a district court hearing an economic offence without a statutory Certificate under the hand of the DPP. The whole proceedings and the decision of the District Court of Mpanda were a nullity, she submitted. With due respect, we agree as much with Ms Lugongo, in eyes of the law there was no trial of economic offence. A casual glance at section 3 (1) and (2), and 12 (3) of the Economic Crimes Act is enough to show that original jurisdiction over economic offences belongs to the High Court and can only be transferred to the district court by a Certificate. These provisions provide:

> ***3.-(1).*** *- The jurisdiction to hear and determine cases involving economic offences under this Act are hereby vested in the* ***High Court****.*
>
> ***(2)*** *The* ***High Court*** *when hearing charges against any person for the purposes of this Act shall be an Economic Crimes Court.* [Emphasis added]

> ***12 (3).*** *- The Director of Public Prosecutions or any State Attorney duly authorized by him, may, in each case in which he deems it necessary or appropriate in the public interest,* ***by certificate under his hand, order that any case involving an offence triable by the Court under this Act be tried by such court subordinate to the High Court as he may specify in the certificate****.* [Emphasis provided]

We have had an occasion in CRIMINAL APPEAL NO 192 OF 2005, **1. RHOBI MARWA MGARE, 2. SAMWEL DAUD, 3. MARWA WILSON CHACHA VS THE REPUBLIC** (unreported), to look at the original jurisdiction of courts over what are now known as "economic crimes" under the Economic Crimes Act. While interpreting section 3 (1) we said that, it is the High Court of Tanzania, sitting as an Economic Crimes Court which has original jurisdiction over economic crimes that are identified under the First Schedule to that Act. We also said that the DPP can also transfer any economic case, by a certificate under his hand, to be tried by a subordinate court.

Needless to say, the first question which every court invariably contends with is its jurisdiction over any matter that is before it. The

question of jurisdiction can be constitutional or statutory. No court can take up jurisdiction over a matter over which a statute has already conferred jurisdiction to another court. For purposes of the present appeal, we have concluded that original jurisdiction over economic crimes for which the appellants were charged and convicted belongs to the High Court; and there was no certificate issued by the DPP to transfer the case to be tried by the district court.

Faced with a proceeding of the trial court that was a nullity *ab initio*, Ms Lugongo suggested a way forward. She beseeched us to order a retrial at a proper court. A retrial will not prejudice the appellants, the learned State Attorney added. She explained that the appellants had begun serving their twenty year prison term as recently as 2010, which is a tiny portion of the entire sentence.

Indeed, the situation calls for our intervention through our power of revision. We reiterated this power in MZA CRIMINAL REVISION NO. 1 OF 2007, **1. MWITA CHACHA, 2. JULIUS FIDELIS KITOKA, 3. ENOS SINGIRYA, 4. MAKWIZI MSUKO**

and 5. ELIAS MARWA @ MANGI VS THE REPUBLIC (unreported) where we said:

> *"The Court's powers to proceed* ***suo motu*** *and revise any finding, order or any decision made in proceedings before the High Court derive from section 4 (3) of the Act quoted above [****Appellate Jurisdiction Act, Cap. 141****]. The sub-section can be invoked where the record discloses incorrectness, illegality or impropriety in any finding, order, or other decision of the High Court or irregularity in the proceedings of the court.* [Emphasis provided]

We as a result of the nullity of the proceedings before trial court, invoke our powers under section 4 (2) of the Appellate Jurisdiction Act, to nullify, quash and set aside the proceedings and decision of the District Court of Mpanda (Economic Case No. 22 of 2007). Based as they were, on a decision of a trial court which lacked requisite jurisdiction, proceedings at the High Court on appeal by the DPP and resulting decision subject of this second appeal were also a nullity and have no legal consequences. We finally direct a new trial at a court of law with jurisdiction to try economic offences. Meanwhile, we order that the appellants to be forthwith released from prison unless otherwise lawfully held.

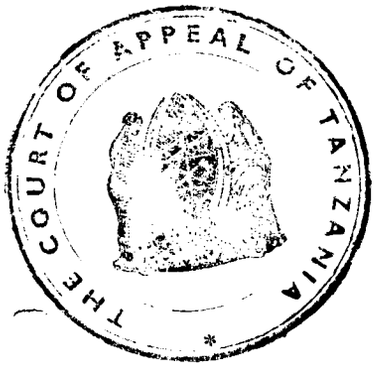
DATED at MBEYA this 7th day of JUNE 2013.

E.M.K. RUTAKANGWA
JUSTICE OF APPEAL

S. MJASIRI
JUSTICE OF APPEAL

I.H. JUMA
JUSTICE OF APPEAL

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



P. W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL