IN THE COURT OF APPEAL OF TANZANIA
AT TABORA

(CORAM: LUANDA, J.A., ORIYO, J.A., And KAIJAGE, J.A.)

CRIMINAL APPEAL NO. 157B OF 2013

KAUNGUZA S/O MACHEMBA..... APPELLANT
VERSUS
THE REPUBLIC..... RESPONDENT

(Appeal from Judgement of the High Court of Tanzania at Tabora)

(Mruma, J.)

dated 20th day of November, 2013
in
(DC) Criminal Appeal No. 73 of 2013

JUDGMEMT OF THE COURT

21st & 24th April, 2015

LUANDA, J.A.:

In the Resident Magistrate Court of Shinyanga sitting at Shinyanga, the appellant KAUNGUZA S/O MACHEMBA was charged with four counts. In the first count he was charged with unlawful entry into a game reserve contrary to sections 15(1) and (2) of the Wildlife Conservation Act, No. 5 of 2009 (the Act) which is not an economic offence; whereas the remaining three counts, the appellant was charged with unlawful hunting in the game reserve (2nd Count), being found in unlawful possession of weapon in a game reserve (3rd Count) and unlawful possession of Government trophy (4th Count) all contrary to the Act and Paragraph 14 of the First Schedule to the

Economic and Organized Crime Control Act, Cap. 2002 R.E 2002 which were economic offences.

After a full trial, the appellant was convicted as indicated hereunder:-

1st Count: Entering into a game reserve. He was sentenced to custodial sentence of one year in jail.

2nd Count: Unlawful hunting in a game reserve. He was sentenced to pay a fine of Tsh. 200,000/= or one year in jail in default.

3rd Count: Being found in unlawful possession of weapon in a game reserve. He was sentenced to pay a fine of Tsh. 150,000/= or one year jail in default.

4th Count: Unlawful possession of Government trophies. He was sentenced to 20 years imprisonment without an option of a fine.

All the sentences were ordered to run concurrently! Be that as it may, the appellant was aggrieved by both the conviction and sentences, he unsuccessfully appealed to the High Court of Tanzania (Tabora Registry). Apart from dismissing the appeal, the High Court quashed the sentence of 20 years imposed by the trial Court and substituted thereof with one of a fine in respect of the 4th Count which is ten times the value of the trophies

ie. Tsh. 54,600,000/= which is the subject matter of the charge. In default to go to jail for a period of 20 years. The appellant failed to pay the fine imposed, he is serving his sentence, presumably the longest term of 20 years. Again the appellant is still dissatisfied, he has come to this Court on appeal.

The appellant has raised six grounds of appeal in his memorandum of appeal challenging the concurrent findings of the two courts below. But when the appeal came up for hearing, Ms. Pendo Makondo learned Principal State Attorney who represented the respondent/Republic did not discuss the grounds of appeal raised by the appellant. Instead she raised a jurisdictional issue which issue could be raised at any time and at any stage of the case as the same goes to the root of justice.

Submitting on the issue of jurisdiction, Ms. Makondo said the appellant was charged with both economic and non-economic offences. The first count is a non-economic offence; whereas the remaining three counts were economic offences. She went on to say the certificate which conferred jurisdiction to the subordinate court to try the case was made under section 12 (3) of the Economic and Organized Crimes Act, Cap. 2002 R.E (the

Economic Act) instead of section 12(4) of the Economic Act which caters for both economic and non-economic offences. She went further to say that since the certificate issued does not cover non-economic offence of which the appellant was also tried, the trial subordinate court had no jurisdiction to adjudicate the case. She cited **Emmanuel Rutta V. R**, Criminal Appeal No. 357 of 2014(CAT-Unreported) to support her argument. She prayed the Court to invoke its revisional powers as they are provided under S. 4(2) of the Appellate Jurisdiction Act, Cap. 141 2002 R.E (The AJA), quash the proceedings, set aside the sentences and order retrial as she put it, the appellant has not yet served substantial portion of his sentence and that the prosecution has a strong case.

The appellant, on the other hand, being a lay person had nothing useful to contribute to the point of law raised. He prayed that he be released from prison.

In terms of S. 3 (1) & (2) of the Economic Act, the High Court is the Economic Crimes Court. Further that before the High Court commences trying such an offence, a consent of the D.P.P must be obtained. On the other hand subordinate courts may also try such offences provided two

conditions are met. One, like the High Court when sitting as an Economic Crimes Court, a consent of the D.P.P must be obtained before commencement of trial as is provided under S. 26 (1) of the Economic Act. Two, the D.P.P or any State Attorney duly authorized must correctly issue a certificate to confer jurisdiction to the subordinate court named in the following two categories:-

(i) *In case it is purely an economic case it must be issued under S. 12(3) of the Economic Act.*

(ii) *In case it is a combination of an economic and non-economic offences it must be issued under S. 12 (4) of the Economic Act.*

So, a certificate issued under either S. 12(3) or S. 12(4) of the Economic Act confers jurisdiction to such subordinate court to adjudicate an economic case. Failure to correctly cite the section will render the trial subordinate court to have no jurisdiction and hence the trial will be declared a nullity.

In **Rutta's** case (supra) the facts were similar to our case. In that case there was a combination of non-economic and economic offences. The learned Principal State Attorney issued an order to confer jurisdiction to the

subordinate court under S. 12(3) instead of S. 12(4) of the Economic Act. This court declared the trial a nullity for lack of jurisdiction on the part of the trial District Court and naturally the first appellate Court.

In our case, we entirely and respectfully agree with Ms. Makondo that the certificate issued under S. 12 (3) of the Economic Act was not proper. The proper certificate which ought to have been issued was that under S. 12(4) of the Economic Act to cover both non-economic and economic offences. The trial conducted by the Shinyanga Resident Magistrate court, therefore, was a nullity. Ms. Makondo prayed for a retrial because she said they had a strong case and that the appellant has yet to serve a substantial portion of his sentence. We have carefully considered this request. We are unable to accede to it. This is because taking the circumstances of this case, there is a likelihood on the part of the prosecution to fill in gaps. We shall demonstrate by giving two instances. One, the certificate of evaluation of trophies which is crucial in stating the value of the trophies was made under a repealed Law – The Wildlife Conservation Act No. 12 of 1972 on 23/9/2010 when already the current Act was in force. The said Act came into force on 1/7/2010 vide GN 231 of 2010 while the offences were allegedly committed

by the appellant on 22/9/2010. The said certificate of evaluation of trophies was made under S. 67(4) of the repealed law Act No. 12/1972 which reads:-

> *67 (4) In any proceedings for an offence under this section a certificate signed by the Director and stating the value of any trophy involved in the proceedings shall be admissible in evidence and shall be prima facie evidence of the matters stated there in including the fact that the signature thereon is that of the person holding the office specified therein.*

The certificate of evaluation of trophies ought to have not been admitted in evidence as it was made under the repealed law. Furthermore there is no provision in the current law similar to that section which might have salvaged the situation. The prosecution will have no alternative but to adduce fresh evidence. That in our view is tantamount to filling in gaps.

Two, there is no evidence on record to show whether in Maswa there is a Game Reserve. It is not enough to state there is such game reserve without adducing evidence to that effect. We are unable to go along with Ms. Makondo. The evidence on the prosecution is not strong as suggested by Ms. Makondo. To order a retrial will, under the above circumstances

enable the prosecution to fill in gaps. This will cause injustice to the appellant.

In **Fatehali Manji V.R**, [1966] EA 343 the Court of Appeal of East Africa restated the principles upon which court should order retrial. It said:-

> *"...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 the purpose of enabling the prosecution to fill up 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 blame, it does not necessarily follow that a retrial should be ordered; each case must depend on its particular facts and circumstances and an order for retrial should only be made where the interests of justice require it and should not be ordered where it is likely to cause an injustice to the accused person..."*

In this case, it is clear that the original trial was defective. But that does not necessarily follow that a retrial should be ordered. We have said why we declined to do so.

In fine, in exercising our revisional power as they are provided under s. 4 (2) of the AJA, we quash all the proceedings of the subordinate courts and set aside the sentences. We order the release of the appellant from prison forthwith unless he is detained for other lawful cause.

Order accordingly.

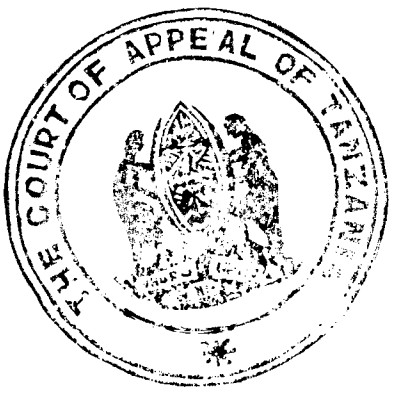
DATED at TABORA this 23rd day of April, 2015.

B. M. LUANDA
JUSTICE OF APPEAL

K. K. ORIYO
JUSTICE OF APPEAL

S. S. KAIJAGE
JUSTICE OF APPEAL

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



E. F. Fussi
DEPUTY REGISTRAR
COURT OF APPEAL