IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

(CORAM: MUGASHA, J.A., MKUYE, J.A., And MWANGESI, J.A.)

CRIMINAL APPEAL NO. 229 OF 2016

WARYOBA YUDA.....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Mwanza)

(Bukuku, J.)

dated the 25th day of April, 2016
in
Criminal Application No. 39 of 2015

JUDGMENT OF THE COURT

17th & 19th July, 2017

MUGASHA, J.A.:

In the District Court of Bunda at Bunda, the appellant **WARYUBA YUDA** and another person **KIROTO S/O MAKONGORO** were charged under Economic Case No. 59 of 2011. Levelled against them were a total of four counts namely:

1. *Entering into a National Park without permit contrary to section 21(1) and (2) of the National Parks Act, Cap 282 RE.2002.*

2. *Unlawful possession of Weapons in a National Park contrary to section 24 (1) (b) and (2) of the National Parks Act, read together with paragraph 14 (c) of the First Schedule to the Economic and Organised Crimes Control Act [CAP 200 RE. 2002].*

3. *Unlawful hunting in a National Park contrary to section 23 (1) of the National Parks Act read together with paragraph 14 (a) of the First Schedule to the Economic and Organised Crimes Control Act [CAP 200 RE. 2002].*

4. *Unlawful possession of Government Trophies contrary to section 86 (1) and (2) (c) of the Wildlife Conservation Act No. 5 of 2009 read together with paragraph 14 (d) of the First Schedule to the*

Economic and Organised Crimes Control Act [CAP 200 RE. 2002].

It was alleged that, on 25/12/2011, the duo without written permission entered Kawanga area into Serengeti National Park within Bunda District, in the Region of Mara, and were found in unlawful possession of weapons and carcases of four Thompson Gazettes valued at Tshs. 896,000/=, the property of the Government of Tanzania.

They did not plead guilty to the charge.

According to the record, they were on 2/10/2013 found guilty and convicted in respect of all the counts as follows: For the 1st count, a fine of Tshs. 8000/= or 9 months imprisonment in default of the fine. In respect of the 2nd count, a fine of Tshs. 8000/= or 9 months. As for the 3rd count a fine of Tshs. 8000/= or 9 months imprisonment in default of the fine. On the 4th count, a fine of Tshs. 8,960,000/- or twenty (20) years imprisonment in default of the fine.

In a bid to pursue an appeal to the High Court, on 26/6/2015, the appellant lodged an application seeking enlargement of time to file a notice of appeal. The application was dismissed hence the present

appeal. In the memorandum of appeal the appellant has filed five grounds of complaint. We have opted not to reproduce those grounds due to what will be apparent in due course.

At the hearing, the appellant appeared in person, unrepresented whereas the respondent Republic had the services of Mr. Emmanuel Luvinga assisted by Ms Sophia Mgassa, all learned State Attorneys.

Before embarking on the merits of the appeal, we *suo motu* invited parties to address on the propriety or otherwise of combined trial of non economic offence and economic offences without the consent and certificate of the DPP or State Attorney in terms of sections 26 (1) and 12 (4) respectively of the Economic and Organised Crimes Control Act.

Mr. Luvinga conceded that, the certificate of transfer was not issued under section 12(4) of Cap 200 and the trial court was not mandated with jurisdiction to try together non economic and economic offences. He added that, the consent as well suffers a similar predicament having only specified economic offences. In this regard, he submitted that, as the trial court was not seized of requisite jurisdiction what transpired before it and the first appellate court is a nullity. He thus

invited us to invoke revisional powers under section 4(2) of the Appellate Jurisdiction Act [**CAP 141 RE.2002**] (the AJA) to quash proceedings, judgment and the conviction by the trial court, the Ruling of the High Court and set aside the sentence. He pressed for a fresh trial.

On the other hand, considering that this is purely a point of law the appellant had nothing to say apart from urging us to set him free because the fault was not of his own making.

Having carefully considered the record, the crucial issue for our determination is whether the trial was not vitiated on account of the incompetent jurisdiction of the trial court to entertain the case which is a subject of this appeal.

It is clear that, the 2nd, 3rd and 4th counts covering unlawful possession of weapons in the National Park, being found in possession of Government trophies and unlawful hunting in the National Park which the appellant and another person were charged with, are Economic Offences. As such, the respective trial required a prior obtaining of Consent of either the Director of Public Prosecutions or subordinate staff

acting in accordance with the general or special instructions of the DPP. This is a prerequisite under section 26 (1) and (2) 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.*
>
> *(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.*
>
> [Emphasis added].

Another count levelled against them in the same charge was the count of entering into a National Park without a written permit which though an offence under the National Parks Act, it is not a specified

economic offence. However, the consent which appears at page 2 of the record of appeal exclusively indicates as follows:

> "**CONSENT OF STATE ATTORNEY IN-CHARGE**
>
> I, **EDWIN KAKOLAKI,** State Attorney in Charge of Musoma Zone, do hereby in terms of section 26 (2) of the Economic and Organized Crime Control Act, [Cap 200 RE 2002] and GN 191 of 1984 **CONSENT** to the prosecution of **KIROTO S/O MAKONGORO** and **WARYOBA S/O YUDA** **for contravening the provisions of paragraphs 14 (a), (c) and (d) of the first schedule to, and sections 57 (1) and 60 (2) of the Economic and Organized Crime Act,** .....the particulars of which are stated in the charge sheet."
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> [Emphasis supplied].

We have gathered that, the Consent was issued with respect to the three counts which are Economic Offences which is envisaged under paragraph 14 (a) (c) and (d) of the Schedule to Cap 2002. However, no similar Consent was issued to cover the first count of entering into the National Park without a written permit which is a non economic offence which appears in the same charge sheet.

According to section 3 of Cap 200, the High Court is mandated with jurisdiction to try Economic Offences. However, a subordinate court may entertain and try an economic offence after obtaining consent of the DPP to prosecute and a certificate of transfer by any State Attorney duly authorized by the DPP to try the offence in a subordinate court pursuant to section 12 (3) of Cap 200. Apparently, the certificate of transfer at page 1 of the record of appeal purporting to confer jurisdiction on the District Court of Bunda reflects as follows:

> **'CERTIFICATE CONFERRING JURISDICTION ON A SUBORDINATE COURT TO TRY AN ECONOMIC CASE**
>
> I, **EDWIN KAKOLAKI,** State Attorney in Charge of Musoma Zone, do hereby in terms of section 12 (3) of the Economic and Organized Crime Control Act, [Cap 200 RE 2002] and GN 191 of 1984 **ORDER** that **KIROTO S/O MAKONGORO** and **WARYOBA S/O YUDA** who are charged for contravening paragraphs **14 (a), (c) and (d) of the first schedule to, and sections 57 (1) and 60 (2) of the Economic and Organized Crime Act,** .....**BE TRIED** By the District Court of **BUNDA** at **BUNDA.**"
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> "[Emphasis added].

The respective certificate clearly shows to have been intended to confer jurisdiction to the subordinate court to try solely an economic case as per dictates of section 12(3) of Cap 2002. However, this is not compatible with the counts levelled against the appellant and another person which include economic offences and non-economic offence. We say so because; the Legislature in its wisdom had anticipated instances where both the economic offences and non economic offence would conveniently be tried together. That is what underlies the enactment of section 12 (4) of Cap 200 which provides:

> "The Director of Public Prosecutions or any State Attorney duly authorised 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 instituted or to be instituted before a court subordinate to the High Court and which involves** a non-economic offence or **both an economic offence and a non-economic offence**, be instituted in the Court."
>
> [Emphasis added].

The cited provision mandates the DPP with powers to sanction the trial of a combination of economic and non-economic offences in the subordinate court. However, in the case at hand from the contents of both the consent and the certificate targeted the trial of economic offences forgetting the non economic offence which was in the same charge sheet.

In view of the stated position of the law, it is clear that, the four counts which combined the economic and non-economic offences against the appellant and another were prosecuted in the District Court of Bunda without the consent and a certificate of transfer issued by the DPP or her subordinate officer. This rendered the District Court of Bunda not seized with requisite jurisdiction to try a combination of economic offences and non-economic offences. Thus, the trial was a nullity as it was underscored in the case of **ABDULSWAMADU AZIZI VS REPUBLIC**, Criminal Appeal No. 180 of 2011 (unreported). The court was confronted with a situation whereby, the appellant was charged with a combination of economic and non economic offences without complying with among others, sections 12(4) and 26 (1) of Cap 200. The Court held that, there

was no consent of the DPP and certificate of transfer of the economic offence to be tried by Bukoba District Court and proceeded to nullify the trial proceedings the conviction and sentence.

Moreover, the Court in its *various* decisions has emphasized on the compliance with the provisions of section 12 (3), 12 (4) and 26 (1) of the Act and held that, the consent of the DPP must be given before the commencement of a trial involving an economic offence. The decisions include the cases of **RHOBI MARWA AND TWO OTHERS VS REPUBLIC,** Criminal Appeal No. 192 of 2005, **ELIAS VITUS NDIMBO AND ANOTHER VS REPUBLIC,** Criminal Appeal No. 272 *of 2007,* **NICO S/O MHANDO AND TWO OTHERS VS REPUBLIC**, *Criminal Appeal No. 332 of 2008 and* **GAITAN S/O SUSUTA VS REPUBLIC,** Criminal Appeal No. 403 of 2015 (all unreported).

In the matter before us, notwithstanding that, the first count against the appellant, of entering into a National Park without a permit is not a specified economic offence, no Certificate was issued to transfer its trial combined with the three specified economic offences as envisaged under Cap 200 to the District Court of Bunda. Since the non economic

offence was intended to be prosecuted together with the three other specified economic offences, then requisite consent and a certificate of transfer must have indicated so in order to confer the District Court of Bunda with the requisite jurisdiction.

In the absence of the requisite consent and certificate conferring jurisdiction on the trial of combined economic and non economic offences, the District Court of Bunda embarked on a nullity to entertain and try Economic Crimes Case No. 59 of 2011. It is unfortunate that, the shortfall missed the eye of the first appellate court, whose respective proceedings are also void having stemmed from null proceedings and judgment of the trial court.

In view of the aforesaid, we agree with Mr. Luvinga that, on account of a null trial, the ensuing conviction and the sentence are nothing but a nullity. Even the proceedings before the High Court on first appeal were a nullity. We invoke our revisional jurisdiction under section 4 (2) of the Appellate Jurisdiction Act, Cap 141 to quash all proceedings and judgments/Ruling of the courts below, the conviction and the sentence is set aside.

We order that the appellant be tried *de novo* at the discretion of the Director of Public Prosecutions. Meanwhile, we order that the appellant be forthwith released from prison unless otherwise lawfully held. It is so ordered.

DATED at **MWANZA** this 18th day of July, 2018.

S. E. A. MUGASHA
JUSTICE OF APPEAL

R. K. MKUYE
JUSTICE OF APPEAL

S. S. MWANGESI
JUSTICE OF APPEAL

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

B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL