IN THE COURT OF APPEAL OF TANZANIA
AT TABORA

(CORAM: MUSSA, J.A., LILA, J.A., AND MWAMBEGELE, J.A.)

CRIMINAL APPEAL NO. 283 OF 2016

1. **MABULA MELA @ MINDI**
2. **MAPORU MATHIAS @ MASUNGA ..... APPELLANTS**
3. **MADUHU MASHASHI @ NDEGE**

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania At Shinyanga)

(Makani, J.)

Dated the 10th day of June, 2016
in
DC Criminal Appeal No. 87 of 2015

.....

JUDGMENT OF THE COURT

29th & 31st August, 2017

MWAMBEGELE, J.A.:

Before the District Court of Bariadi at Bariadi, the three appellants, together with another person who did not appeal, were arraigned for four counts; **first**, unlawful entry into a National Park contrary to section 21 (1) and (2) of the National Parks Act, Cap. 282 of the Revised Edition, 2002; **two**, unlawful possession of weapons in a National Park contrary to section 24 (1) (b) and (2) of the National Parks Act, Cap. 282 of the Revised Edition, 2002 read together with paragraph 14 (a) of the first schedule to the Economic and Organised Crime Control Act, Cap. 200 of the Revised

Edition, 2002; **three**, unlawful hunting in a National Park contrary to section 23 (1) of the National Parks Act, Cap. 282 of the Revised Edition, 2002 read together with paragraph 14 (a) of the first schedule to the Economic and Organised Crime Control Act, Cap. 200 of the Revised Edition, 2002 and; **four**, unlawful possession of government trophies contrary to section 86 (1) and (2) (b) and (2) of the Wildlife Conservation Act, Act. No. 5 of 2009 read together with paragraph 14 (d) of the first schedule to the Economic and Organised Crime Control Act, Cap. 200 of the Revised Edition, 2002.

Upon a fully-fledged trial, the accused persons were convicted as charged and each sentenced to: **one**, a fine of Tshs. 10,000/= or one year in jail in default; **two**, a fine of Tshs. 20,000/= or two years in jail in default; **three**; a fine of Tshs. 50,000/= or three years in jail in default; and **four**, a fine of Tshs. 46,400,000/= or 20 years in jail in default thereof. The three appellants were aggrieved by the convictions and sentences meted out to them. Their appeals to the High Court were not successful hence this second appeal by which they lodged separate memoranda of appeal.

When the appeal was called on for hearing on 28.08.2018, the appellants appeared in person, unrepresented. Mr. Solomon Lwenge and Ms. Margareth Ndaweka, both learned Senior State Attorney, joined forces to represent the respondent Republic. When we called upon the first appellant to argue his appeal, fending for himself, he adopted his Notice of Appeal as well as the Memorandum of Appeal he earlier filed and opted to reserve any clarification thereon in rejoinder, if need would arise. The second and third appellants, who also fended for themselves, followed suit; that is, each adopted his respective memorandum of appeal and opted to hear the learned Senior State Attorney respond and would rejoin if need would arise.

Responding, Mr. Lwenge, for the Republic, supported the appeal by all the appellants. He anchored his support on what he called a legal point. The learned Senior State Attorney submitted that the trial court entertained the matter without jurisdiction in that the consent and certificate of the Director of Public Prosecutions (henceforth "the DPP") were not part of the record of proceedings of the trial court. Elaborating, the learned Senior State Attorney stated that at page 7 of the record of appeal the prosecution told the trial court that the consent and certificate of the DPP

were not in place. The learned Senior State Attorney also referred us to page 8 of the record of appeal where the prosecution prayed to file both the consent and the certificate of the DPP as well as to read to the accused persons a substituted charge sheet. However, Mr. Lwenge went on, the record of proceedings is silent on whether the said consent and certificate were filed or received by the court and the copies appearing at pages 5 and 6 do not have any endorsement to signify that they were received by the trial court.

In view of the foregoing, the learned Senior State Attorney submitted, the District Court proceeded to hear the economic crimes case without jurisdiction. He thus implored the Court to use its revisional powers bestowed upon it by the provisions of section 4 (2) of the Appellate Jurisdiction Act, Cap. 141 of the Revised Edition, 2002 (henceforth "the AJA") to revise the proceedings of the trial court and quash them as well as the conviction and set aside the sentences. Having so done, the learned Senior State Attorney beckoned upon us to order a fresh trial in respect of fourth count. The prayer for a fresh trial was founded on the reason that there was ample evidence to mount a conviction against the appellants in respect of the fourth count. The learned Senior State Attorney cited and

supplied to us our decision in the case of **Adam Selemani Njalamoto v. Republic**, Criminal Appeal No. 196 of 2016 to bolster up his propositions. As for the rest of the counts, the learned Senior State Attorney was of the view that the appellants, who were convicted on 14.05.2014, might have finished serving sentences in respect of those counts. In the circumstances, he submitted, a retrial in respect of those counts would be inadvisable.

In a short rejoinder, the first appellant lamented that he has been behind bars for quite some time then. Thus, he added, a prayer for a retrial would be quite detrimental to him. After all, the ailment the subject of the prayer was not caused by him but, rather, by the trial court. In the premises, the first appellant went on, he should not be made to suffer on the mistakes of the trial court. The second and third appellants had the same line of arguments as the first appellant.

We have juxtaposed the arguments of the appellants against the submissions of the learned Senior State Attorney in the light of the record of appeal. As rightly submitted by the learned Senior State Attorney, the second, third and fourth counts with which the appellants were charged fell within the scope and purview of economic crimes offences. They fall under

para 14 of the first schedule to the Economic and Organised Crime Control Act, Cap. 200 of the Revised Edition, 2002 (henceforth "the Act"). In the premises, it was the economic crimes court; that is, the High Court, which had jurisdiction to try those economic crimes offences in terms of section 3 (1) of the Act. Any court other than the economic crimes court would be clothed with jurisdiction to try an economic crimes case if there is a consent and a certificate to confer jurisdiction upon that court by the DPP or State Attorney duly authorised by him. That is a requirement of section 12 (3) of the Act. In the case at hand, the prosecution prayed to file the relevant consent and certificate as the record reflects, the same were not taken by the court. Let what transpired in the trial court on 02.10.2013 paint the picture:

> *"02/10/2013*
>
> *CORAM: OGUDA, R.A. R/M*
>
> *Pros: Elisa Benjamin*
>
> *C/c S. Matongo*
>
> *Accused: Present*
>
> ***Prosecution:*** *This matter is coming for mention, investigation is complete, I also pray to file*

consent and certificate and do pray to read the substituted charge to the accused.

Court: The charge is read over to the accused who reply as follows:-

1st accused:	*1st count:*	*it is not true*
2nd count:	"	
3rd count:	"	
4th count"	"	
2nd accused:	*1st count:*	*it is not true*
2nd count:	"	
3rd count:	"	
4th count	"	
3rd accused:	*1st count:*	*it is not true*
2nd count:	"	
3rd count:	"	
4th count	"	
4th accused:	*1st count:*	*it Is not true*
2nd count:	"	
3rd count:	"	

4th count" "

A plea of not guilty has been read over as to the accused own plea to each count.

OGUDA, R.A. R/M

02/10/2013"

It is apparent therefore that after the prosecution prayed to tender the consent and certificate of the DPP to confer jurisdiction upon the trial court, what went on thereafter was to read to the accused persons the substituted charge and take their respective pleas. As bad luck would have it, the consent and certificate appearing at paged 5 and 6 do not bear any endorsement thereon to connote that they were received by the trial court. In the circumstances, it is doubtful whether the consent and certificate were received by the trial court. The best answer would be that which is in favour of the appellants. The doubt is therefore to be resolved in favour of the appellants. We therefore find and hold that the District Court of Bariadi entertained and heard the economic crimes offences without jurisdiction. The proceedings and their consequent judgment were therefore a nullity. We use our powers of revision under section 4 (2) of the AJA to quash the proceedings and judgment of the trial court. As the proceedings and judgment of the first appellate court stem from nullity proceedings and

judgment, they are also a nullity. We quash them as well. The sentences meted out to the appellants by the trial court and confirmed by the first appellate court are set aside.

As to the way forward after quashing the proceedings and judgments of both lower courts, and setting aside the sentences, we agree with the learned Senior State Attorney that given the circumstances of this case, and relying on the principles set out in **Ahmed Sumar v. Republic** [1964] EA 481 **Fatehali Manji v. Republic** [1966] EA 343, followed by the Court in a number of decisions including **Adam Selemani Njalamoto v. Republic** (supra), a retrial order in respect of the fourth count will be apposite. As already stated above, in respect of the fourth count, each appellant was sentenced to twenty years in jail on 14.05.2014. The sentence were confirmed by the High Court on 01.06.2014. We are certain in our minds that the circumstances of the case are such that justice will smile if a retrial is ordered in respect of the fourth counts.

In view of the above, we order that this matter be remitted to Bariadi District Court for the appellants to be tried afresh on the fourth count only before another magistrate of competent jurisdiction. We further order that should a fresh trial end against the appellants, in imposing the sentences,

the period they have been incarcerated should be taken into consideration, of course without compromising the prevailing laws on the matter. In the meantime, it is finally ordered that the appellants should remain in custody while they await the resumption of the trial.

Order accordingly.

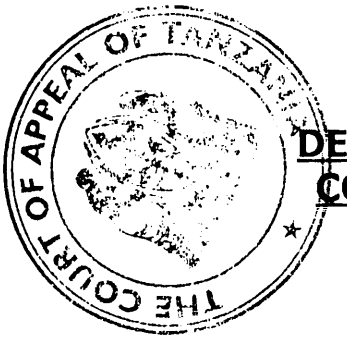
DATED at **TABORA** this 30th day of August, 2018.

K. M. MUSSA
JUSTICE OF APPEAL

S. A. LILA
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

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



A. H. Msumi
DEPUTY REGISTRAR
COURT OF APPEAL