

**IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA**

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

CRIMINAL APPEAL NO. 350 OF 2016

MADENI NINDWAAPPELLANT

VERSUS

THE REPUBLICRESPONDENT

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

(Gwae, J.)

dated the 30th day of June, 2016

in

DC. Criminal Appeal No. 171 of 2015

JUDGMENT OF THE COURT

16th & 19th July, 2017

MUGASHA, J.A.:

The appellant **MADENI NINDWA** was charged, tried and convicted by the District Court of Magu (Economic Case No. 2 of 2014) on the following two counts:—

(1) Unlawful possession of Government trophies contrary to section 86(1) and (2) (b) of the Wildlife Conservation Act No. 5 of 2009 read together with paragraph 14 (d) of

the First Schedule to and section 57 (1) and 60 (2) of the Economic and Organised Crimes Control Act [CAP 200 RE. 2002]

(2) Failure to report possession of Government trophy contrary to section 87 (1) and (2) of the Wildlife Conservation Act, No. 5 of 2009.

It was alleged that, on 26/11/2014 at about 10.00 hrs at Mwalukonge area, Lamadi center within Busega District in Simiyu Region, the appellant was found in unlawful possession of Government Trophies to wit: 6 pieces of elephant tusks weighing 18 kilogrammes valued at Tshs. 17, 325,000/= the property of the Tanzania Government. In addition it was further alleged that, he failed to report the possession of Government Trophies.

The appellant was sentenced to imprisonment to a term of twenty (20) years. Moreover, the trial court ordered that the tusks in question be restored to Tanzania National Parks (TANAPA).

After the dismissal of his first appeal, the appellant filed the present appeal. The memorandum of appeal contains nine grounds of complaint. At the hearing, the appellant appeared in person, unrepresented whereas the respondent Republic had the services of Mr. Juma Sarige, learned Senior State Attorney and Ms. Sabina Chogogwe, learned State Attorney.

Before embarking on the merits of the appeal, we *suo motu* invited parties to address us on the legality of the trial proceedings before the District Court where the trial was a combination of an economic offence and a non-economic offence without the consent and certificate of the DPP or State Attorney in terms of section 12 (4) of the Economic and Organised Crimes Control Act.

After perusing through the record of appeal, Mr. Sarige conceded that, there was no certificate issued under section 12(4) of Cap 200 vesting the trial court with jurisdiction to try together the count disclosing an economic offence and that disclosing non economic offence. He thus submitted that, the entire proceedings before the trial and first appellate court are a nullity. In this regard, he invited us to

invoke section 4(2) of the Appellate Jurisdiction Act [CAP 141 RE.2002] (the AJA) to revise the proceedings in the courts below and make appropriate orders.

On the other hand considering that this is purely a point of law the appellant had nothing to say.

The issue for our determination is whether the trial court had the jurisdiction to entertain the case which is a subject of this appeal.

Jurisdiction of courts is a creature of statute and not what the litigants like or dislike. This was emphasized in the case of **ISRAEL MISEZERO @ MINANI VS REPUBLIC**, Criminal Appeal No, 117 of 2006 (unreported) where the Court said:

"Our courts are creatures of statutes and they have such powers as are conferred upon them by statute."

Likewise, in the trial of economic offences which are intended to be tried together with non-economic offences, the respective jurisdiction of the trial courts and the requisite pre-conditions are

regulated by among others, the provisions of the Economic and Organised Crimes Control Act as we shall demonstrate in due course.

At the outset, we wish to point out that, the first count of unlawful possession of Government Trophy for which the appellant was charged with, is an Economic Offence whose trial required a prior Consent of either the Director of Public Prosecutions (the DPP) or of any officer acting in accordance with the general or special instructions of the DPP. This is in accordance with 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].

We have noted that, the Consent, appearing on page B1 of the record of appeal dated on 1st December, 2014 was issued with respect to the first count as an Economic Offence. However, no similar Consent was issued to cover the second count of namely: **FAILURE TO REPORT POSSESSION OF GOVERNMENT TROPHY** c/s 87 (1) of the Wildlife Conservation Act, No 5 of 2009. The respective part of that Consent exclusively covers the first count on the offence of unlawful possession of trophy which is envisaged under paragraph 14 (d) of the First Schedule to Cap. 200 as follows:

"CONSENT OF STATE ATTORNEY IN-CHARGE

*I, **YAMIKO ALFREDY MLEKANO**, Senior State Attorney in Charge of Mwanza Zone, do hereby in terms of section 26 (2) of the Economic and Organized Crime Control Act, No. 13 of 1984 [R.E. 2002] and by virtue of the*

*Economic Offences (Specification of Officer Exercising Consent) Notice No. 284 of 15th August, 2014, give my **CONSENT** to the prosecution of **MADENI S/O NINDWA for having contravened the provisions of: UNLAWFUL POSSESSION OF GOVERNMENT TROPHIES, Contrary to section 86 (1) and (2) (b) of the Wildlife Conservation Act[No 5 of 2009] read together with Paragraph 14 (d) of the first schedule to, and section 57 (1) and 60 (2) of the Economic and Organized Crime Act,***

[Emphasis supplied].

In terms of section 3 of Cap 200, jurisdiction to try Economic Offences vests in the High Court. However, an economic offence may be tried in a subordinate court where in addition to obtaining consent of the DPP to prosecute, 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. Page B2 of the record of appeal shows that, on 1st December, 2014 a Certificate was issued to transfer the charge of unlawful possession of Government Trophy levelled

against the appellant in the first count to be tried by the District Court of Magu at Magu which reflects as follows:

"CERTIFICATE

*I, **YAMIKO ALFREDY MLEKANO**, State Attorney In-Charge, having been duly appointed by the **DIRECTOR OF PUBLIC PROSECUTIONS** under section 12 (3) of the Economic and Organized Crime Control Act, No. 13 of 1984 **DO HEREBY** in the Public interest order that the following accused person namely: **MADENI S/O NINDWA** who is charged with the offence triable by the Economic Crimes Court namely **UNLAWFUL POSSESSION OF GOVERNMENT TROPHIES**, Contrary to section 86 (1) and (2) (b) of the Wildlife Conservation Act[NO. 5 OF 2009] read together with **Paragraph 14 (d) of the first schedule and section 57 (1) and 60 (2) of the Economic and Organised Crime Act....**, **BE TRIED** by the District Court of Magu at Magu."*

[Emphasis added].

In addition, the DPP has been conferred with powers to sanction the trial of a combination of economic and non-economic offences in the subordinate court whereby section 12 (4) of Cap 200 categorically states:

"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."

With the stated factual and the clear position of the law, it is vivid that the two counts against the appellant which combined the economic and non-economic offences were prosecuted in the District Court of Magu without the consent and a certificate of transfer issued by the DPP or her subordinate officer. However, the non economic offence on the failure to report possession of Government Trophies is not reflected

in the certificate. It is the Certificate of transfer in terms of section 12 (4) of Cap 200 which would have seized the District Court of Magu with requisite jurisdiction to try a combination of economic offences and non-economic offences. Reiterating the need to obtain prior consent under section 26 (2) of Cap 200 and certificate of transfer conferring jurisdiction, in **ABDULSWAMADU AZIZI VS REPUBLIC**, Criminal Appeal No. 180 of 2011 (unreported) the Court said:

*"...In the instant case, the counts against the appellant combined the economic and non-economic offences, but again no certificate of the DPP was issued. This Court in its various decisions had emphasized 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. For instance, See, the decisions in the cases of **Rhobi Marwa Mgare and Two Others v. The Republic**, Criminal Appeal No. 192 of 2005, **Elias Vitus Ndimbo***

and Another v. The Republic, Criminal Appeal No. 272 of 2007, ***Nico s/o Mhando and Two Others v. The Republic***, Criminal Appeal No. 332 of 2008 (all unreported).

As pointed earlier herein above, in the instant case the appellant was charged with a combination of economic and non-economic offences, but the requirements of section 12 (3), 12 (4) and 26(1) of the Act were not complied with. There was no consent of the DPP and certificate of transfer of the economic offence to be tried by Bukoba District Court. For that reason, we are constrained to find that the trial and proceedings before the District Court of Bukoba in Criminal Case No. 153 of 2008 and the High Court Criminal Appeal No. 8 of 2010 at Bukoba were nothing but a nullity. That also leads us to the finding that even the conviction and sentence were null and void."

[Emphasis added].

[See also **GAITAN S/O SUSUTA VS REPUBLIC**, Criminal Appeal No. 403 of 2015 (unreported).

Since it is clear to us that, the DPP or his designated officer had intended the District Court of Magu to combine the trial of an Economic Offence together with a Non-Economic Offence, a Certificate should have been filed in compliance with 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].*

Notwithstanding that, the second count against the appellant, of failure to report possession of Government Trophies is not specified under Cap 200 to be an Economic Offence, no Certificate was issued to transfer its trial combined with the first count to the District Court of Magu. Since it was intended to be prosecuted together with the economic offence of unlawful possession of Government trophies, then consent and a certificate of transfer reflecting the two counts should have been availed by the DPP or her subordinates in order to confer the District Court of Magu with the requisite jurisdiction. Without the consent and certificate conferring jurisdiction on the trial of combined economic and non economic offences, the District Court of Magu acted without jurisdiction to entertain and try Economic Crimes Case No. 02 of 2014. What is the fate of the decision of the District Court of Magu? In **DESAI V. WARSAMA (1967) E.A. 351** the Court had this to say in respect of a decision made without jurisdiction:

"It is well established law that a judgment of a court without jurisdiction is a nullity and HALSBURY 351 set out the proposition briefly thus:

"Where a Court takes it upon itself to exercise a jurisdiction which it does not possess its decision amounts to nothing."

In view of what we have endeavoured to discuss, finally, we are inclined to agree with Mr. Sarige that, as the District Court of Magu lacked requisite jurisdiction over the combined economic and non-economic counts, the trial was a nullity. As no appeal can stem from a nullity, it is unfortunate that, this skipped the attention of the High Court at Mwanza in DC Criminal Appeal No. 171 of 2015 when it sat as the first appellate court since 23/11/2016.

We thus exercise our powers of revision under section 4 (2) of the Appellate Jurisdiction Act, Cap 141. We quash all proceedings and judgments of the courts below, the conviction and set aside the sentence imposed on the appellant.

We order that the matter be remitted to the court with competent jurisdiction for a trial *de novo* which should be based on consent and certificate of transfer reflecting the provisions of sections 26 (1) and 12

(4) of Cap. 200 respectively. And, should the appellant be found guilty and convicted after his fresh trial, the period the appellant has spent in custody should be taken into account in the resulting sentence. Meanwhile, the appellant shall remain in custody to await a retrial. 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