

IN THE COURT OF APPEAL OF TANZANIA

AT TANGA

(CORAM: MUSSA, J.A., LILA, J.A. And MKUYE, J.A.)

CRIMINAL APPEAL NO. 26 OF 2017

DIRECTOR OF PUBLIC PROSECUTIONS.....APPELLANT

VERSUS

**1. PETRO JOSEPH MWARABU }
2. RICHARD JOSEPH ABDALLAH }RESPONDENTS**

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

(Khamis, J.)

dated the 30th day of October, 2015

in

Criminal Appeal No. 28 of 2015

JUDGMENT OF THE COURT

20th & 25th February, 2019

LILA, J.A.:

The appellant is aggrieved by the decision of the High Court at Tanga in DC. Criminal Appeal No.28 of 2015 delivered on 30/10/2015 in which the High Court set free the respondents after it had allowed their appeal, quashed their conviction by the trial court and set aside the sentence.

In the trial court, the respondents were charged in Economic Criminal Case No. 2 of 2010 with two counts. In the first count they

were charged with the offence of being found in unlawful possession of Government trophy contrary to sections 86(1) and (2)(c)(iii) of the Wildlife Conservation Act No.5 of 2009 read together with section 57(1) and paragraph 14(d) of the First Schedule of the Economic and Organized Control Act, Cap 200 R.E 2002 and in the second count they were charged with the alternative offence of failure to report unlawful possession of Government trophy contrary to section 87(1) and (2) of the Wildlife Conservation Act No.5 of 2009.

In the first count it was alleged that on 01/01/2010 at or about 20:00hrs at Chumbageni area within the City, District and Tanga Region the respondents were found in unlawful possession of Government trophy to wit 114 elephant tusks valued at 44,044,000/= the property of the Government of Tanzania.

The particulars in the second count alleged that on 31/12/2009 at around 10:00 hrs at Chumbageni area within the City, District and Tanga Region the respondents saw 114 elephant tusks valued at forty four million and forty four thousand Tanzania Shillings (Tzs 44,044,000/=) in possession of another person not authorized to possess Government trophy but did not report.

The record bears out that the first and second respondents were employed as watchman and house boy, respectively, in the premises owned by one Kijangwa. Upon receiving information from an undisclosed informer, the police conducted search in the house and 114 elephant tusks were found therein. The respondents were arrested and were arraigned before the Resident Magistrates Court where they pleaded not guilty to the charges. At the conclusion of the trial, the respondents were found guilty in the first count and were each convicted and sentenced to serve 20 years imprisonment.

Aggrieved, the respondents successfully appealed to the High Court, their convictions were quashed and were, as hinted above, set at liberty. The appellant was aggrieved by that decision, hence the instant appeal.

As it turned out, the 1st respondent did not survive to resist the appeal, for, when the appeal was called on for hearing on 13/2/2019, only the 2nd respondent entered appearance and was unrepresented. Mr. Peter Busoro Maugo, learned Principal State Attorney, and Mr. Waziri Mbwana Magumbo, learned State Attorney, represented the appellant. Mr. Maugo took liberty to inform the Court that the 1st respondent passed away but he had no proof. We accordingly adjourned the

hearing to 20/2/2019 to allow him avail the Court with proof of death of the 1st respondent.

As was scheduled, the case was called on for hearing on 20/2/2019. The 2nd respondent appeared in person and was, again, unrepresented. Mr. Maugo and Mr. Magumbo featured again acting for the appellant. Mr. Maugo presented to the Court a letter from the Village Executive Officer for Yamba Village and statements by Christina Petro @ Mwarabu, the wife of the deceased (1st appellant), Omari Ally @ Kamwendo, a chairman of Kwezinga area and Makarata Augustino, all informing that the 1st respondent died and was buried on 7/3/2016 at Mlalo. He accordingly urged the Court, under Rule 78(1) of the Rules, to mark the appeal abated. On his part, the 2nd respondent had no objection to have the appeal marked abated as against the 1st respondent. We accordingly marked the appeal abated against the 1st respondent.

The appellant raised two grounds of appeal. However, when Mr. Maugo was called on to argue the appeal, he diverted from submitting on the grounds of appeal and, instead, informed the Court that upon a serious examination of the record he has realized that the certificate issued by the Director of Public Prosecutions (DPP) conferring

jurisdiction to the subordinate court to try an economic offence was wrongly issued under section 12(3) of the Economic and Organized Crimes Control Act, (CAP. 200 R. E. 2002) (the EOCCA). In elaboration, he said, the respondents were arraigned in the Resident Magistrate's Court on a charge comprised of both an economic and a non-economic offence hence the proper section under which the certificate ought to have been issued is section 12(4) of the EOCCA. He pointed out that following failure to cite the proper section conferring jurisdiction, the trial subordinate court lacked the requisite jurisdiction to try the case. The trial was therefore a nullity, he added. He urged the Court to invoke its powers of revision under section 4(2) of the Appellate Jurisdiction Act, Cap. 141 R. E. 2002 (The AJA), to quash the proceedings and judgments of both courts below and the conviction and set aside the sentence. On the fate of the 2nd appellant, he at first proposed that the case be returned to the trial court so that a proper certificate will be issued and trial commence afresh. However, when prompted by the Court whether that will, legally, not walk injustice to the 2nd respondent because that court has no jurisdiction, he left it to the Court to decide.

As expected, the 2nd appellant had nothing to contribute on the legal issue raised by Mr. Maugo. It was, being a layperson, beyond his comprehension. He also left it to the Court to do justice to him.

It is evident from the record that the respondents were jointly arraigned and convicted on a charge comprised of two offences. In the first count they were charged with unlawful possession of Government trophies which was charged under the EOCCA. This is an economic offence. In the second count they were charged with failure to report unlawful possession of government trophies. The offence is charged under the Wildlife Conservation Act and is a non-economic offence.

According to EOCCA, the court competent to try the offence under it is the High Court. However, the DPP is, under section 26(2) of EOCCA, vested with powers to give consent for the case to be tried by a court subordinate to the High Court. The record bears it out that he rightly issued his consent that the case be tried by the Resident Magistrate's Court of Tanga. The DPP is also required to issue a certificate under section 12(4) of EOCCA transferring the case to the subordinate court. Specific to a situation where the charge is comprised of both economic and no-economic offence, as is the case herein; such a certificate is issued under section 12(4) of EOCCA. That section states:

*"12(4). The Director of Public Prosecutions or any State Attorney duly authorized by him, may, in each case 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 non-economic offence, be instituted in the Court.**" (Emphasis added)*

In the present case, the DPP through one Joseph Pande, the State Attorney -Incharge, issued a certificate under section 12(3) of the EOCCA. As rightly argued by Mr. Mugo, that certificate fell far short of conferring jurisdiction to the Resident Magistrates Court on account of the charge before it combining both economic and non-economic offence. A proper certificate ought to have been issued under section 12(4) of EOCCA. The certificate that was issued under section 12(3) of EOCCA was therefore issued under a mistake of fact. In the circumstances, the situation in the present case is, actually, as if no

certificate was issued. The Resident Magistrates Court therefore lacked the requisite jurisdiction to try the case. Confronted with an identical situation, the Court, in the case of **Nico Mhando and Two others Vs. Republic**, Criminal Appeal No. 332 of 2008 (unreported), stated that:

"In the circumstances, the consent of the DPP to prosecute together with a certificate of transfer to the District Court were mandatorily required. Otherwise, in the absence of such consent and certificate, the District Court lacked jurisdiction and hence the entire proceedings were a nullity."

Given the above position of the law, we are inclined to agree with the learned Principal State Attorney that the respondents were not properly tried. We hereby, exercising our revisional powers bestowed upon us under section 4(2) of AJA, quash the proceedings and judgments of the trial court and the High Court on first appeal. We set aside both the sentence meted out to the 2nd respondent by the trial court and the High Court's order allowing the appeal and setting him free. We find it legally improper to order the 2nd respondent be retried for the reason that the court before which he was formally tried lacked

jurisdiction. We, instead, leave it to the DPP to determine whether or not to commence fresh prosecution against him.

DATED at TANGA this 25th day of February, 2019.


K. M. MUSSA
JUSTICE OF APPEAL



S. A. LILA
JUSTICE OF APPEAL

R. K. MKUYE
JUSTICE OF APPEAL

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


E. Y. MKWIZU
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL