IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

(CORAM: MBAROUK, J.A., MWAMBEGELE, J.A. And KWARIKO, J.A.)

CRIMINAL APPEAL NO. 337 OF 2016

MHOLE SAGUDA NYAMAGU.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Bukuku, J.)

dated the 8th day of June, 2016
in
Criminal Appeal No 123 of 2015

JUDGMENT OF THE COURT

1st & 5th April, 2019.

MBAROUK, J.A.:

This appeal is against the Judgment of the High Court of Tanzania at Mwanza in Criminal Appeal No. 123 of 2015 dated the 8th day of June, 2016. The appellant was charged in the District Court of Bunda at Bunda of three counts. The offence on the **first count** was Unlawful Entry into the National Park c/s 21 (1) (a) (2) of the National Parks Act, Cap. 282 R.E. 2002. It was alleged on this count that, on the

13th day of November, 2013, at Iharara area in Serengeti National Park, the appellant did unlawfully enter into the said Serengeti National Park; the **second count** was on the offence of Unlawful Possession of Weapon into the National Park c/s 24 (1) (b) of the National Parks Act, Cap. 282 R.E. 2002. It was alleged on this count that, the appellant had been found on the 13th day of November, 2013 at Mlima Nyamuma area in Serengeti National Park, unlawfully possessing weapon to wit one panga and three animal trapping wires, without permission from the authorized authority; and the **third count** was on the offence of Unlawful Possession of Government Trophy c/s 86 (1) (2) (c) (ii) of the Wildlife Conservation Act, No. 5 of 2009. It was alleged on this count that, the appellant had, on the 13th day of November 2013, at Mlima Nyamuma area in Serengeti National Park, been unlawfully found in possession of six (6) dried pieces of Wildebeest meat together with two (2) dried tails of Wildebeest valued at Tshs. 2,080,000/=, the property of the United Republic of Tanzania. The trial court

found him guilty as charged and convicted him accordingly. He was then sentenced to one year in prison in respect of the first count, three years in prison in respect of the second count and to pay a fine of Tshs. 20,800,000/= or twenty (20) years imprisonment in default.

His appeal to the High Court failed. Still aggrieved, the appellant has appealed to this Court, against both conviction and sentence. The appellant's dissatisfaction with the decision of the High Court is expressed in the following grounds of appeal:-

1. *That the first appellate court judgment was unreasonable and unfair since despite of been expunged an exhibit P1 did not fault the trial court findings, in favour of the appellant.*
2. *That an exhibit P2 "C" collectively is defective and baseless as it is implausible for PW2 to had (sic) a valuation of trophy before identifying the kind of wildebeest alleged killed (sic).*

3. *That PW1 and PW3 who purported to seize an unknown wildebeest from appellant did not tender them but PW3 who did not seize them tendered them in court, thus an exhibit P2 "B" inventory note was invalid and baseless.*
4. *That there was no any sketching (sic) map of the National Park was tendered as to ascertain whether or not Nyamume Hill was within the boundaries of the Park.*
5. *That due to fatal contradictions (sic) goes (sic) to the root of the case uprooted from PW1 and PW3's evidence which was shaken and taken into account that they were at the same place and view, shouldn't be reliable to convict.*
6. *That the whole prosecution witness's evidence was incredible with an interest to save, further was cooked and planted against the appellant for benefit much known by them.*

7. *That the appellant "Mhole Saguda Nyamagu" entered the plea of not guilty to the charge, still the case was tried to final without tendering a certificate for consent nor a jurisdiction from the DPP, instead of producing of one "More Sagula" (sic) never charged. Thus the whole charge was tainted.*

At the hearing of the appeal, the appellant appeared in person, unrepresented, whereas the respondent/Republic was represented by Ms. Ajuaye Bilishanga, Senior State Attorney.

Apart from praying the Court to do him justice by allowing his appeal, the appellant had nothing more to add, but he prayed to adopt the grounds raised in his memorandum of appeal.

The Republic supported the appeal Ms. Bilishanga on giving the reason for supporting the appeal, submitted that, in relation to ground number seven in the appellant's grounds of appeal, the trial court determined the case

without jurisdiction. That, the third count the appellant was charged with, requires consent from the Director of Public Prosecution (DPP) since the offence there at, is an economic in nature. That, exhibit B1 and B2 contained certificates of consent which contained wrong name of the appellant. The certificates contain the name of "More" instead of "Mhole" as it appears in the charge sheet. Ms. Bilishanga submitted further that, as the charge sheet contains different name from that found in the certificate of consent, hence the trial court conducted the matter without jurisdiction to entertain the same. To bolster her argument, she directed us to our decision in **Abraham Adamson Mwambene versus Republic**, Criminal Appeal No. 148 of 2011 (unreported).

In this regard, Ms. Bilishanga was of the view that, such an omission attracts a re-trial, but because there are some other irregularities in the record, she was hesitant to seek the order. The learned Senior State Attorney pointed out these irregularities as follows; that, PW2 tendered

exhibit P.2 collectively without following the prerequisite procedure. Further that, the exhibits were disposed of on 14-11-2013, while the appellant was yet to answer charge as he was brought in Court for the first time on 15-11-2013. She stated that, the requirement of the law was not complied with. She referred us to the decision of this Court in **Emmanuel Saguda @ Sulukuka and Another versus Republic,** Criminal Appeal No. 422 "B" of 2013 (unreported).

Concluding her argument Ms. Bilishanga submitted further that, exhibit P2 collectively marked "C", the valuation report, was tendered by PW2 in contravention of the law. That PW2 during the time of tendering was not of the proper rank to tender it as directed by section 114(3) of the Wildlife Conservation Act, Cap. 283 of 2009.

Another ailment pointed out by Ms. Bilishanga is that, the charge sheet had combined two types of offences where one type was the 1st and 2nd count, which are ordinary

offence which do not require the DPP's consent, while another one is the 3rd count, being an economic offence, requires the DPP's consent. Yet both types were tried by a court clothed with the DPP's consent and certificate and under a case titled "Economic Crimes Case No. 173 of 2013." In the end, she submitted that, the anomaly renders the charge sheet defective. To redress the mishap, the learned Senior State Attorney urged us to invoke our revisional jurisdiction under section 4 (2) of the Appellate Jurisdiction Act, Cap. 141 R.E. 2002, (the AJA) and nullify the entire proceedings of the two courts below and, in lieu thereof, order for appellant's release from the prison.

The appellant on his rejoinder had nothing to say but prayed the Court to set him free.

At this juncture, we think, it is not out of place, to state that in this case there is no dispute, in view of the evidence in the record of appeal, that under section 3(1) of the Economic and Organized Crimes Act, Cap. 200 R.E.

2002, (the Act), the High Court is the Economic Crimes Court. However, economic crimes cases can be tried in the subordinate courts where the Director of Public Prosecutions fulfills certain conditions. A consent to have the case tried by a subordinate court under section 26(1) of Cap. 200 R.E. 2002 must be issued. The section reads:-

> *"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."*

The Director of Public Prosecutions is also required to issue a certificate under section 12 (3) of the same Act, transferring the case for trial in the subordinate court. The section provides:

> *"The Director of Public Prosecutions or any State Attorney dully*

authorized by him, may, in each case in which he deems it necessary or appropriate in the public interest, by a certificate, under his hand, order that any case involving an offence triable by the Court under the Act, be tried by such Court subordinate to the High Court as may be specified in the certificate."

It was held in the case of **Paulo Matheo versus Republic,** [1995] T.L.R 144 that:-

"the consent of the Director of Public Prosecution must be given before any trial involving an economic offence can commence."

As indicated earlier, the appellant was not only charged with an economic offence in the third count. He was in addition charged with offences under the National Park Act, [Cap. 282 R.E. 2002] and under the Wildlife

Conservation Act [Cap. 283 R.E. 2003]. Under section 12(4) of the same Act which read:

> *"The Director of Public Prosecutions or any State Attorney duly authorized by him, may, in each case which he deems it necessary or appropriate in the public interest, by a 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."*

As the record reveals, the purported Consent issued by the State Attorney in-charge and the Certificate conferring jurisdiction on the trial subordinate court to try an economic offence; were both either erroneously drafted or meant for

an accused person other the one in the instant case, where the name of the accused appearing on those documents, differ from that appearing in the charge sheet. The ailment renders the two documents invalid in the case at hand, they are as well as if they were not issued, hence the case proceeded on an illegal route. In other words, there were neither consent nor certificate issued by the DPP in the case at hand, as the law requires.

The learned State Attorney In-Charge was required to issue a certificate to the District Court of Bunda authorizing it to try the appellant Mhole Saguda Nyamagu with the combination of the offences he was charged with. The decisions of the Court in the cases of **Niko Mhando & Two others versus Republic,** Criminal Appeal No. 332 of 2008, **Magesa Chacha & another versus Republic,** Criminal Appeal No 222 of 2011 and **Jovinary Senga & three others versus Republic,** Criminal Appeal No.157 of 2013 (all unreported) expound on the procedure for trial of a

combination of economic cases and ordinary cases in the subordinate courts.

Any omission in complying with any of the sections enumerated above, leaves any subordinate court with no jurisdiction to try any economic offence or a combination of economic offences and ordinary offence. Since in this appeal the learned State Attorney in-charge at Musoma Zone failed to comply with section 12(4) of the Economic and Organized Crimes Controls Act (the Act), the District Court of Bunda lacked jurisdiction to try the appellant. The provisions of section 12(5) of the Act are clear on this position. See, **Abraham Adamson Mwambene versus Republic**, (*supra*) and **Emmanuel Rutta versus The Republic,** Criminal Appeal No.357 OF 2014 (both unreported).

We wish to point out here that, in the absence of a proper certificate issued under section 12(4) of the Act, it was inappropriate for the appellant to be prosecuted in respect of an economic crime in conjunction with a non-

economic crime. As rightly argued by the learned Senior State Attorney, the appellant was tried in violation of section 12 (4) of the Act.

From the foregoing brief discussion, we are satisfied that in the absence of the D.P.P's consent given under Section 26 (1) of the Act and the requisite certificates given under subsections (3) and (4) of section 12 of the Act, the trial District Court had no jurisdiction to hear and determine charges against the appellant, as it did. We further firmly hold that, the purported trial of the appellant was a nullity. In similar vein, the proceedings and the judgment made by the High Court dated 8/06/2016 based on null proceedings of the trial court were also a nullity.

Having said so, we are of the view that, our analysis on that ground of complaint alone is enough to dispose of the appeal. Considering the fact that the appellant has so far served substantial part of the sentences imposed on him, and bearing in mind the learned Senior State Attorney's

views, we are obliged, in the circumstances, not to order a retrial. Meanwhile, we order the immediate release of the appellant from prison unless he is otherwise lawfully held. We so order.

DATED at **MWANZA** this 3rd day of April, 2019.

M. S. MBAROUK
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

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

B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL