

IN THE COURT OF APPEAL OF TANZANIA

AT TANGA

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

CRIMINAL APPEAL NO. 260 OF 2017

**1. HASHIMU ATHUMANI
2. SANDE MUSSA** } **APPELLANTS**

VERSUS

THE REPUBLIC.....RESPONDENT

**(Appeal against conviction and sentence from the decision of the
High Court of Tanzania at Tanga)**

(Khamis, J.)

dated the 14th day of July, 2017

in

Criminal Appeal No. 131 of 2016

JUDGMENT OF THE COURT

19th & 25th February, 2019

MKUYE, J.A.:

In the Resident Magistrates' Court of Tanga at Tanga, the appellants Hashimu Athumani and Sande Mussa and another person Roman Michael @ Osama were charged in Economic Case No. 1 of 2015 on two counts. In the first count, the trio were charged with malicious injury to property contrary to sections 326(1) and 326 (6A) (a) of the Penal Code [Cap 16 R.E 2002] read together with section 22(1) (a) and (c) of the Penal Code [Cap 16 R.E

2002] as amended. In the second count, they were charged with occasioning loss to a specified authority contrary to paragraph 10 (1) of the First Schedule to, and sections 57 (1) and 60 (2) both of the Economic and Organized Crime Control Act [Cap 2002 R.E. 2002] (the EOCCA) read together with section 22 (1) (a) and (c) of the Penal Code [Cap 16 R.E. 2002].

It was alleged in the 1st count that the trio on divers dates between 12th day of May, 2014 and 13th day of May, 2014 at Majani Mapana area within the City and Region of Tanga, did willfully and unlawfully destroy an electric transformer valued at US Dollar 2,229,922 which is equivalent to Tshs 3,679,371,300/=, the property of Tanzania Electricity Supply Company (TANESCO).

As to the 2nd count, it was alleged that the trio on the same dates and place did jointly and together by their willful acts, cause Tanzania Electricity Supply Company to suffer a pecuniary loss amounting to US Dollar 2,229,922 which is equivalent to Tshs 3,679,371,300/=.

After a full trial, Roman Michael Osama was found not guilty and was acquitted. As to the two appellants, they were found guilty, convicted and sentenced as follows:

"1st Count:- Each accused to serve jail term of twenty (20) years.

2nd Count:- Each accused to serve jail term of seven (7) years."

The sentences were ordered to run concurrently.

Aggrieved by the decision of the trial court, the appellants appealed to the High Court but their appeals were dismissed. Hence, they filed a joint appeal on four grounds assailing the concurrent findings of the two courts below which for a reason to be apparent shortly, we do not intend to reproduce them.

When the appeal was called on for hearing, both appellants appeared in person and unrepresented; whereas the respondent Republic was represented by Mr. Peter Busoro Mugo, learned Principal State Attorney.

Before we could embark on hearing the appeal on its merit, we ***suo motu*** invited the parties to address us on the legality of the proceedings

before the trial court on a combined economic and non-economic offences while the certificate issued under section 12(3) the EOCCA was for the trial of the economic offence only in the subordinate court. To be particular, we wanted to satisfy ourselves whether the trial court had jurisdiction to try the case.

Mr. Maugo, outrightly, submitted that by trying both an economic offence and non-economic offence under the certificate issued under section 12(3) of the EOCCA, the trial court lacked jurisdiction. He said, the certificate ought to have been issued under section 12(4) of the EOCCA. In the circumstances, he prayed to the Court to invoke its revisional powers under section 4(2) of the Appellate Jurisdiction Act, [Cap 141 R.E 2002] (the AJA) and nullify the proceedings and judgments of the trial court and the High Court, quash the conviction and set aside the sentences imposed on the appellants. As to the fate of the appellants he left it to the Court to determine.

On their part, the appellants, this being a legal issue did not have anything to contribute. They left the matter in the hands of the Court to determine.

The issue for determination by this Court is whether the trial court had the requisite jurisdiction to try both an economic and non-economic offence together.

Essentially, under section 3 of the EOCCA, it is the High Court which is vested with jurisdiction to try economic offences. The said section provides as follows:

"3(1) The jurisdiction to hear and determine cases involving economic offences under this Act is hereby vested in the High Court."

It is not insignificant to point out here that the said economic offences are validly tried by the court after obtaining a consent of the Director Public Prosecutions (the DPP) as per section 26(1) of the EOCCA which stipulates as under:

"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."

This, however, does not mean that all economic offences are triable by the High Court. The subordinate courts are also mandated to try economic

offences provided they obtain a consent of the DPP as per section 26(2) of the EOCCA and a certificate of transfer issue by him (the DPP) or any State Attorney authorized by him to do so in terms of section 12(3) of the EOCCA which provides as follows:

*"12 (3) The Director of Public Prosecutions or any State Attorney duly authorized 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 involving an offence triable by the Court under this Act be tried by such court subordinate to the high Court as he may specify in the certificate.**"*

[Emphasis added].

Besides that, section 12(4) of the same EOCCA provides for the issuance of a certificate of transfer of a case involving an economic offence in combination with a non-economic offence. It states as follows:

"12(4) The Director of Public Prosecutions or any State Attorney duly 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 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."

In this case, as we have hinted earlier on, the appellants were charged with malicious injury to property contrary to sections 22(1) (a) and (c) and 326(1) and (6A) (a) of the Penal Code which by its nature was a non-economic offence. Also they were charged with occasioning loss to a specified authority contrary to paragraph 10(1) of the First Schedule to, and sections 57(1) and 60(2) of the EOCCA read together with section 22(1) (a) and (c) of the Penal Code which was an economic offence. The charge was accompanied by a DPP's consent which was properly issued under section 26(2) of the EOCCA and a certificate of transfer issue under section 12(3) of the same Act which we think, was not properly issued. The said certificate is couched as follows:

"CERTIFICATE OF THE DIRECTOR OF PUBLIC PROSECUTIONS CONFERRING JURISDICTION ON SUBORDINATE COURT TO TRY ECONOMIC CRIME OFFENCES.

***I, MATERNUS MARANDU**, State Attorney In-charge, duly authorized by the Director of Public Prosecutions to act on his behalf, DO HEREBY, in*

*terms of section 12(3) of the Economic and Organized Crimes Control Act (CAP 200 R.E 2002) ORDER that **ROMAN s/o MICHAEL @ OSAMA, OMARY S/O HASHIM ATHMANI and SANDE S/O MUSSA** who are charged for contravening the provisions of paragraph 10 of the First Schedule to, and section 57(1) and 60 (2) of the Economic and Organized Crimes Control Act (CAP 200 R.E 2002) read together with section 22 (1) (a) and (c) of the Penal Code as amended which is triable by the Economic Crimes Court BE TRIED IN THE Resident Magistrates' Court of Tanga at Tanga.*

Dated at Tanga this 24th day of February, 2015

Sgd

.....
MATERNUS J. MARANDU

STATE ATTORNEY INCHARGE."

What can be gathered from the above quoted certificate is that, the certificate of transfer was issued under section 12(3) of the EOCCA which confers jurisdiction to the subordinate court to try an economic offence. The non-economic offence was not included in the offences transferred to be tried in the subordinate court. Much as it was not included in the certificate

of transfer, it was not proper to issue a certificate under section 12(3) of the EOCCA in a situation where there was a combination of an economic offence and non-economic offence. Indeed, the proper provision under the situation was section 12(4) of the EOCCA which confers jurisdiction to the subordinate court to hear and determine both economic and non-economic offences. In the absence of a valid certificate conferring jurisdiction to the subordinate court under section 12(4) of the EOCCA, we are settled in our mind that the Resident Magistrate's Court of Tanga did not have jurisdiction to hear and determine both economic and non-economic offences against the appellants. Hence, this anomaly renders the entire proceedings a nullity.

This Court in the case of **Abdulswamadu Azizi V. Republic**, Criminal Appeal No. 180 of 2011 (unreported) in emphasizing the importance of complying with the provisions of sections 12 (3),12(4) and 26(1) of the EOCCA stated as follows:

"In the instant case, the counts against the appellant combined the economic and non-economic offences, but again the 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 cases of **Rhobi Marwa Mgare and Two others v. 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 out earlier here in above, in the instant case the appellant was charged with a combination of economic and non-economic offences, but the requirement of sections 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.”

Similarly, in the case of **Madeni Nindwa v. Republic**, Criminal Appeal No. 350 of 2016 (unreported) when the Court was faced with a situation like the one at hand, it stated as follows:

*"In view of what we have endeavored to discuss, finally, we are inclined to agree with Mr. Sarige that as the District Court of Magu lacked 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 of Mwanza in Dc. Criminal Appeal No. 171 of 2015 when it sat as the first appellate court since 23/11/2016 [See also **Waryoba Yuda v. Republic**, Criminal Appeal No.229 of 2016 (unreported)]"*

In the same vein, as we are satisfied that the trial court had no jurisdiction to try the economic offence in conjunction with the non-economic offence, we find that all proceedings and judgments of the trial court and the High Court were a nullity.

Consequently, in exercise of our revisional powers vested on us under section 4(2) of the AJA, we hereby nullify all proceedings and judgments of the trial court and the High Court, quash the conviction and set aside the

sentences meted out against the appellants. We further order that the appellants be released forthwith from the custody unless otherwise held for other lawful reasons.

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