

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

**(CORAM: LILA, J.A, MKUYE, J.A., And KITUSI, J.A.)**

**CRIMINAL APPEAL NO. 452 OF 2017**

**MATHEO NGUA.....1<sup>ST</sup> APPELLANT**  
**RICHARD MASALA.....2<sup>ND</sup> APPELLANT**  
**JOFREY SAIMON.....3<sup>RD</sup> APPELLANT**  
**EDWIN GERALD.....4<sup>TH</sup> APPELLANT**

**VERSUS**

**D.P. P.....RESPONDENT**

**(Appeal from the decision of Resident Magistrate Courts  
at Mbeya)**

**(Herbert, SRM – Ext, J.)**

**Dated the 23<sup>rd</sup> day of August, 2017**

**in**

**Criminal Appeal No. 01 of 2017**

.....

**JUDGMENT OF THE COURT**

24<sup>th</sup> March & 3<sup>rd</sup> April, 2020.

**KITUSI, J.A.:**

The District Court of Chunya convicted the appellants with being found in unlawful possession of Government Trophy, an offence under section 86 (1) (2) (c) (ii) 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 Control Act, [Cap. 200 R.E. 2002].

It was alleged that Matheo Ngua, Richard Masala, Jofrey Saimoni and Edwin Gerady Mkutwa, the first, second, third and fourth appellants respectively, together with two other people who were initially charged but later discharged, were found in unlawful possession of five kilograms of Hippopotamus meat valued at Tshs. 3,990,000/=, the property of the government of the United Republic of Tanzania.

The evidence that sank the appellant's boat was that; on 6/9/2015 at around 17:00 hours when Hadija Ahungu (PW1) and Aman Mganyo (PW2) both Game Wardens working at Lutwati/Piti Game Reserve area, were on patrol, they came across foot marks of human being leading from Lake Rukwa shores to the reserved area. They traced the marks to a spot where they found a local oven for roasting meat. Around that place there were also remains of a slaughtered animal which they detected to be a hippopotamus. However, there were no people around.

PW1 and PW2 saw a boat on the lake with people in it. They approached the boat by using their own patrol boat because they suspected the people in the boat to be connected with the slaughtered Hippopotamus, the remains of which had been found earlier. It turned out that there were about seven people in the boat in which about five

kilograms of meat from a Hippopotamus was found. The suspects were allegedly also in possession of a gun which, however, they threw into the lake to stay clear of more trouble.

The culprits were arrested and charged. In defence all appellants denied the allegations. They stated that they were found fishing outside the reserved area and that the meat was planted on them by the game wardens. The District Court sentenced them each to twenty years imprisonment and to a fine of Tshs. 5,000,000/= each. Their appeal against the convictions and sentences was dismissed by the High Court for want of merit. They now appeal hereto.

The appellants each filed a separate memorandum of appeal, the details of which we may not be called upon to deliberate on. This is because Mr. Ofmedy Mtenga, learned State Attorney who represented the respondent Director of Public Prosecution, right from the outset raised the issue of the jurisdiction of the District Court which tried the case. The learned State Attorney pointed out that under section 3 of the Economic and Organised Crimes Control Act Cap. 200, the Act, it is the High Court that has the jurisdiction to try economic cases, unless the DPP confers jurisdiction to subordinate courts by a certificate under

section 12 (3) of the Act. He argued that since there is no certificate by the DPP conferring jurisdiction on the District Court of Chunya in this case, it had no jurisdiction to try it. He supported his position with the decision of the Court in **Maganzo Zelamoshi @ Nyanzomola v. Republic**, Criminal Appeal No. 355 of 2016 (unreported).

The learned counsel prayed that we invoke our jurisdiction under section 4 (2) of the Appellate Jurisdiction Act, (Cap. 141 R.E. 2019) (the AJA) and nullify the proceedings and the resultant orders. He was however hesitant to pray for an order of retrial because, he submitted, there is no sufficient evidence to prove the case against the appellants beyond reasonable doubt. He cited, as would be expected, the case of **Fatehali Manji v. Republic**, [1966] E.A. 343.

Mr. Mtenga proceeded to cite three instances of inadequacy in the prosecution case to augment his position. First, he submitted that the prosecution introduced Exhibit P3 into evidence to show that the meat was destroyed and its inventory (Exhibit P3) kept in proof of existence of that meat. He challenged the fact that the appellants were not given the right to take part in the destruction of the meat. The learned State Attorney cited the case of **Mohamed Juma Mpakama v. Republic**,

Criminal Appeal No. 385 of 2017 (unreported) in which such omission was considered fatal.

Secondly, the learned State Attorney submitted, when the prosecution sought to tender the certificate of seizure, the appellants objected to its admissibility. However, even before the prosecution could respond to the objection, the court overruled it, clearly showing that it was biased in favour of the prosecution.

The third and last instance is that in their defence the appellants stated that they were found fishing on the lake, which was supported by the evidence of PW3 who said that the appellants were in possession of fishing nets. The Court found them guilty of being unlawfully in the reserved area, yet convicted them with being in unlawful possession of government trophy.

When the appellants were called upon to address the Court on their appeal, they simply agreed with the position taken by the learned State Attorney and prayed for their release.

Without ado, we are in agreement with the learned State Attorney that the District Court of Chunya had no jurisdiction to try this case. This

is because under the Act the jurisdiction to try economic cases is vested in the High Court. Section 3 provides: -

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

There is however an exception to that rule but it is also statutory, and that is that the DPP may confer jurisdiction to a subordinate court by a consent under section 26 (1) of the Act and a certificate of transfer issued under section 12 (3) of the Act. If that is not done, then the proceedings before such subordinate court become a nullity. See the case of **Adam Seleman Njalamoto v. Republic**, Criminal Appeal No. 196 of 2016 (unreported). In that case the Court held, *inter alia*: -

*"In view of this legal position, the appellant was prosecuted without consent and a certificate of transfer by the Director of Public Prosecutions, in the result, we are of the view that the proceedings, conviction and sentences in the trial court and in the first appellate court were illegal and nullity."*

Similarly, in this case, under section 4 (2) of the AJA we declare the proceedings before the District Court of Chunya and the resultant convictions, sentences a nullity and so were the proceedings before the High Court which upheld those illegal proceedings. We agree with the learned State Attorney on this point.

Now we think the next question of whether we should order a retrial or not, is a question of what the justice of the case demands, regard being to the principles in the case of **Fatehali Manji v. Republic** (*supra*), cited by Mr. Mtenga. In this case Mr. Mtenga has submitted that we should not order a retrial because given the defects that were manifest in the trial, there is no evidence against the appellants.

Once again, we share Mr. Mtenga's views because the defect in the tendering of the certificate of seizure and the omission to have the appellants participate in the exercise of destroying the meat were grave. While an order of retrial may give the prosecution the opportunity to rectify some of the defects or fill in gaps, which we should guard against, the other defect cannot be rectified and that renders the would- be prosecution case weak. Nothing for instance, can be done about the

omission to have the appellant take part or be present at the time of destroying the meat. So, an order of a retrial will be an exercise in futility.

Therefore, having nullified the proceedings, quashed the judgments of the District Court and that of the High Court, we set aside the sentence. In exercise of our powers of revision under section 4 (2) of the AJA we order the immediate release of the appellants unless their continued incarceration is for another lawful cause.

**DATED** at **MBEYA** this 2<sup>nd</sup> day of April, 2020.

S. A. LILA  
**JUSTICE OF APPEAL**

R. K. MKUYE  
**JUSTICE OF APPEAL**

I. P. KITUSI  
**JUSTICE OF APPEAL**

The Judgment delivered this 3<sup>rd</sup> day of April, 2020 in the presence of the Appellants in person and Mr. Ofmedy Mtenga, learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.



  
A. H. MSUMI  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**