IN THE COURT OF APPEAL OF TANZANIA

AT SHINYANGA

(CORAM: MWARIJA, J.A., MWAMBEGELE, J.A., And KEREFU, J.A.)

CRIMINAL APPEAL NO. 557 OF 2016

1. MABULA MBOJE
2. LIMBU MAHOLA ..... **APPELLANTS**
3. MASANJA MADUHU

VERSUS

THE REPUBLIC ..... **RESPONDENT**

(Appeal from the Judgment of the High Court of Tanzania, at Shinyaga)

(Kibella, J.)

dated the 31st day of October, 2016
in
DC Criminal Appeal No. 80 of 2016

.....

JUDGMENT OF THE COURT

11th & 20th August, 2020

MWAMBEGELE, J.A.:

This appeal stems from the decision of the District Court of Bariadi, at Bariadi in Shinyanga Region, before which the appellants Mabula Mboje, Limbu Mhola and Masanja Maduhu were jointly and together arraigned for four counts. On the first count, they were charged with unlawful entry into the game reserve contrary to section 15 (1) and (2) of the Wildlife Conservation Act, Cap. 283 of the Revised Edition, 2009 – Cap. 283 of the

Laws of Tanzania (the Wildlife Conservation Act). It was alleged that on 06.11.2011, at about 03:00 hours, at Mwalali area, the trio jointly and together, entered into Maswa Game Reserve within Bariadi District in Shinyanga Region without written permit from the Director of Wildlife.

On the second count, they were charged with unlawful possession of weapons in a game reserve contrary to section 17 (1) and (2) of the Wildlife Conservation Act, read together with paragraph 14 (c) of the First Schedule to the Economic and Organized Crimes Control Act, Cap. 200 of the Revised Edition, 2002 (the Economic and Organized Crimes Control Act). It was alleged that on 06.11.2011, at about 03:00 hours, at Mwalali area within Maswa Game Reserve, they were found in unlawful possession of weapons, to wit; two knives, one spear and sixteen trapping wires without any permit and failed to satisfy the authorized officer that the said weapons were intended to be used for purposes other than hunting, killing, wounding or capturing of animals.

On the third count they were charged with unlawful hunting in the game reserve contrary to section 19 (1) and (2) of the Wildlife Conservation Act, it being alleged that on the same date, time and place,

they were found hunting game animals, to wit; twenty five warthogs without written permit from the Director of Wildlife.

On the last count, the appellants were charged with unlawful possession of Government Trophies contrary to section 86 (1) and (2) (c) (ii) of the Wildlife Conservation Act read together with paragraph 14 (d) of the First Schedule to the Economic and Organized Crimes Control Act. It was alleged that on the same date, time and place within Maswa Game Reserve, they were found in possession of Government trophies, to wit; twenty hind limbs of fresh meat, twenty fore limbs of fresh meat and fifteen full carcasses of fresh meat equal to twenty five animals killed valued at Tshs. 8,925,000/=, the property of the Government of Tanzania.

The appellants stood trial and were eventually convicted of all four counts. For the first count, they were each sentenced to pay a fine of Tshs. 300,000/= or to serve a sentence of two years in prison. On the second count, they were each sentenced to pay a fine of Tshs. 150,000/= or to serve three years in prison. As regards the third count, they were each sentenced to pay a fine of Tshs. 500,000/= or to serve a jail term of seven years. With respect to the fourth count, the appellants were each

sentenced to pay a fine of Tshs. 89,250,000/= or to serve twenty five years in jail.

The appellants were not amused by the decision of the trial court. They thus appealed to the High Court of Tanzania at Shinyanga where Kibella, J. dismissed their appeal in its entirety on 31.10.2016. Still protesting their innocence, they have knocked the doors of this Court on second appeal seeking to assail the decision of the first appellate court on six grounds of grievance. For reasons that will become apparent shortly, we shall not reproduce them.

The appeal was argued before us on 11.08.2020 during which the appellants appeared in person remotely through a video link; a facility of the Judiciary of Tanzania, at Shinyanga District Prison. The respondent Republic had the services of Mr. Tumaini Kweka, learned Principal State Attorney and Ms. Margaret Ndaweka, learned Senior State Attorney.

When we gave the appellants the floor to argue their appeals, they, in turns, simply adopted their respective six-ground memorandum of appeal without more and proposed to hear the Republic to respond. They, however, reserved their right to rejoin, need arising.

Responding, Ms. Ndaweka, at the outset, intimated to the Court that she supported the appeal by the appellants. Substantiating her stance, she submitted that the appellants were charged with four counts, two counts of which were for non-economic offences and the other two catered for economic offences. She contended that the certificate given by the Director of Public Prosecutions (the DPP) to confer jurisdiction upon the District Court to entertain and hear the matter was given under section 12 (3) of the Economic and Organized Crimes Control Act. That was not an appropriate provision of the law under which the certificate could be issued in the circumstances of this case where the charge constituted a combination of both economic and non-economic offences, she argued. The appropriate provision should have been section 12 (4) of the Economic and Organized Crimes Control Act.

In the premises, she contended, the Certificate Conferring Jurisdiction on a Subordinate Court to try an Economic Offence appearing at p. 3 of the record of appeal was invalid and never conferred jurisdiction it purported to. Given the circumstances, she submitted, the proceedings in the trial court as well as the proceedings in the first appellate court were a nullity. The learned Senior State Attorney thus implored us to invoke the

powers of revision bestowed upon us by the provisions of section 4 (2) of the Appellate Jurisdiction Act, Cap. 141 of the Revised Edition, 2019 (the Appellate Jurisdiction Act) to nullify the proceedings in both courts below. Ms. Ndaweka buttressed her argument with our decision in **Saidi Lyangubi v. Republic**, Criminal Appeal No. 324 of 2017 (unreported) in which, confronted with an akin situation, we took the course of action she proposed.

The learned Senior State Attorney did not stop there; she thereafter intimated to the Court that she was hesitant to pray for a retrial in that the trial was blemished with some ailments which will make a retrial a futile exercise. First, she contended, the appellants were not involved in the disposal of exhibits contrary to what we observed in **Saidi Lyangubi** (supra). Secondly, she submitted that some of the exhibits adduced in evidence offended the procedure dictated by case law. The learned Senior State Attorney made reference to the certificate of valuation (Exh. P2) and the inventory (Exh. P3) which were admitted in evidence at p. 14 of the record but were not read out in court and explained to the appellants after their admission. Relying on what we stated in **Saidi Lyangubi** (supra),

the learned Senior State Attorney submitted that, that was a fatal irregularity.

Given the above reasoning, the learned State Attorney found herself loath to pray for a retrial. She thus had no qualms if the appellants would be released from prison.

In view of the response of the learned Senior State Attorney, the appellants had very little in rejoinder. They, in unison, prayed for their release from prison custody to end their ordeal.

The basic question that this judgment should answer is whether the proceedings in both lower courts were a nullity for the supposedly invalid Certificate Conferring Jurisdiction on a Subordinate Court to try an Economic Offence which appears at p. 3 of the record of appeal. Indeed, it cannot be gainsaid that the Certificate complained of was made under the provisions of section 12 (3) of the Economic and Organized Crimes Control Act. For easy reference, we reproduce the said Certificate hereunder:

> *"I,* ***TIMON VITALIS****, Senior State Attorney In-charge, Shinyanga Zone, in terms of section 12 (3) of the Economic and Organized Crimes Control Act,*

No. 13 of 1984 [CAP 200 R.E. 2002] and GN No. 191 of 1984 ORDER that

1. *MABULA S/O MBOJE 2. LIMBU S/O MAHOLA*
3. *MASANJA S/O MADUHU*

Who is/are charged for contravening paragraph 14 (c), 14 (a) and 14 (d) of the 1st Schedule to the Economic and Organized Crimes Control Act No. 13 of 1984 [Cap 200 R.E. 2002] BE TRIED BY THE DISTRICT COURT OF BARIADI.

Signed at Shinyanga this 16th day of November, 2011.

T. Vitalis

SENIOR STATE ATTORNEY IN-CHARGE"

As we have seen from the beginning of this judgment, it is also crystal clear that the appellants were charged with both economic and non-economic offences; an important fact which does not feature in the Certificate. The procedure for trial of a combination of economic and non-economic in the subordinate courts has been a subject of discussion in a number of our decisions. Decisions falling in this basket are **Saidi Lyangubi** (supra), cited to us by Ms. Ndaweka, **Abraham Adamson**

Mwambene v. Republic, Criminal Appeal No. 148 of 2011, **Magesa Chacha Nyakibali & Another**, Criminal Appeal No. 222 of 2011, **Emmanuel Rutta v. Republic**, Criminal Appeal No. 357 of 2014, **Kaunguza Machemba v. Republic**, Criminal Appeal No. 157B of 2013, and **Director of Public Prosecutions v. Petro Joseph Mwarabu**, Criminal Appeal No. 26 of 2017 and **Hashimu Athumani & Another v. Republic**, Criminal Appeal No. 260 of 2017 (all unreported), to mention but a few.

In **Abraham Adamson Mwambene** (supra), the appellant was charged in a subordinate court with a combination of economic and non-economic offences and no certificate by the DPP was issued. Having propounded that the certificate of the DPP was a document that could not be dispensed with in such circumstances, we also observed as follows in respect of trials with a combination of economic and non-economic offences in subordinate courts:

> *"... an economic crime could not be prosecuted in conjunction with a non-economic crime in a subordinate court without the D.P.P.'s sanction under section 12 (4) of the same Act [the Economic and Organized Crimes Control Act]."*

Likewise, in **Emmanuel Rutta** (supra), we were confronted with a similar situation in which, like in the case at hand, the appellant was charged in a subordinate court with a combination of economic and non-economic offences and a certificate by the DPP conferring jurisdiction on that subordinate court was made under the provisions of section 12 (3) of the Economic and Organized Crimes Control Act. We relied on our previous decisions in **Niko Mhando & 2 Others v. Republic**, Criminal Appeal No. 332 of 2008, **Magesa Chacha & Another v. Republic**, Criminal Appeal No. 222 of 2011 and **Jovinary Senga & 3 others v. Republic**, Criminal Appeal No. 157 of 2013 (all unreported) to hold:

> *"... because the learned Principal State Attorney complied only with sections 26 (1) and 12 (3) and failed to comply with section 12 (4) then the District Court of Bukoba lacked the jurisdiction to try the appellant with a combination of the offences of unlawful possession of firearms and ammunition under the Economic and Organized Crimes Control Act, No. 13 of 1984 as amended by Act. No. 10 of 1989 and those of the armed robbery under the Penal Code."*

To clinch it all, in **Kaunguza Machemba** (supra), a case which is on all fours with the instant case, relying on **Emmanuel Rutta** (supra), we held:

> *"... the D.P.P or any State Attorney duly authorized must correctly issue a certificate to confer jurisdiction to the subordinate court named in the following two categories:-*
>
> *(i) In case it is purely an economic case it must be issued under S. 12 (3) of the Economic Act [the Economic and Organized Crimes Control Act].*
>
> *(ii)* ***In case it is a combination of an economic and non-economic offences it must be issued under S. 12 (4) of the Economic Act*** *[the Economic and Organized Crimes Control Act]."*
>
> [Emphasis supplied].

In the above cases, we held that failure to comply with the provisions of section 12 (4) of the Economic and Organized Crimes Control Act vitiates the proceedings and, in all instances, they were declared a nullity.

In view of the fact that the Certificate by the DPP through Mr. Timon Vitalis, Senior State Attorney in Charge in the Chambers of the Attorney General at Shinyanga, was made under section 12 (3) of the Economic and Organized Crimes Control Act was invalid, the subordinate court concerned was, in the circumstances, not clothed with the requisite jurisdiction to try the combination of economic and non-economic offences facing the appellants. The proceedings before it were a nullity right from the beginning. So were the proceedings in the first appellate court because they were rooted on nullity proceedings.

We thus invoke the powers bestowed upon us by section 4 (2) of the Appellate Jurisdiction Act and declare the proceedings and the judgment thereon in the trial court a nullity and quash them. The proceedings and judgment in the first appellate court which stemmed from nullity proceedings must follow suit; they are also declared a nullity and quashed. The convictions and sentences meted out to the appellants by the trial court and upheld by the first appellate court are, respectively, quashed and set aside.

Having found and held as above, what then should be the way forward? This is the question to which we now turn. Ms. Ndaweka, quite a

true officer of the Court, refrained from praying for a retrial. She ascribed such course of action to two main reasons; first, that the appellants were not involved in the disposal of the trophies as observed at p. 12 in **Saidi Lyangubi** (supra) and, secondly, that Exh. P2 and P3 tendered in evidence, were not read out in court after they were admitted. We are at one with the learned Senior State Attorney. Indeed, the record of appeal shows that there was carried out an exercise disposing of the perishable Government Trophies supposedly found in possession of the appellants. In the circumstances, retrying the appellants, if ordered, will be without the said Government Trophies.

Likewise, the certificate of evaluation (Exh. P2) and the inventory (Exh. P3) which were admitted in evidence at p. 14 of the record but the same record does not show if they were read out in court and explained to the appellants after the admission. This is a fatal ailment which makes the exhibit expungable. It is now settled that failure to read out an exhibit after admission is fatal and the same must be expunged from the record – see: **Sylvester Fulgence v. Republic**, Criminal Appeal No. 507 of 2016 - [2019] TZCA 476 at www.tanzlii.org, **Erneo Kidilo & Another v. Republic**, Criminal Appeal No. 206 of 2017 - [2019] TZCA 253 at

www.tanzlii.org and **Robert P. Mayunga & Another v. Republic**, Criminal Appeal No. 514 of 2016 - [2019] TZCA 487 (all unreported), to mention but a few.

There is yet another disquieting aspect which makes a retrial order not desirable. This is that, out of the three witnesses for the prosecution, Anthony Simon Nkwabi (PW2) was not sworn before giving evidence. This was a flagrant disregard of the provisions of section 198 (1) of the Criminal Procedure Act, Cap. 20 of the Revised Edition, 2002 (the CPA). The subsection provides:

> *"Every witness in a criminal cause or matter, shall subject to the provisions of any other written law to the contrary, be examined upon oath or affirmation in accordance with the provisions of the Oaths and Statutory Declarations Act".*

In the case at hand, PW2 was under no exception to comply with section 198 (1) of the CPA. He was recorded as a Christian and therefore should have given his evidence on oath in terms of the proviso to section 4 of the same Act. That was not done and, we think, the ailment watered down the prosecution case.

In the circumstances, we are increasingly of the view that a retrial order is likely to prejudice the appellants. As we held in **Fatehali Manji v. Republic** [1966] 1 EA 343, at p. 344:

> *" ... in general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered; each case must depend on its particular facts and circumstances and* ***an order for retrial should only be made where the interests of justice require it and should not be ordered where it is likely to cause an injustice to the accused person.****"*
>
> [Emphasis supplied].

In view of the above, we are in agreement with Ms. Ndaweka, learned Senior State Attorney, that ordering a retrial will be an exercise in futility for the prosecution and will also be tantamount to allowing the prosecution to fill in the gaps pointed out hereinabove. If anything, it will

mean deviating from prosecuting the appellants to persecuting them, which course will leave justice crying. We, as guardians of justice, are not prepared to take that course.

In the upshot, we order that the appellants – Mabula Mboje, Limbu Mahola and Masanja Maduhu – be released from prison custody unless they are otherwise lawfully held there for some other offence.

It is so ordered.

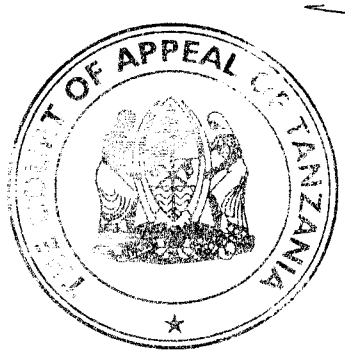
DATED at **SHINYANGA** this 19th day of August, 2020.

A. G. MWARIJA
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

The judgment delivered this 20th day of August 2020, in the Presence of the Appellant in person via video link and Ms. Wampumblya Shani, learned State Attorney for the Respondent, is hereby certified as a true copy of the original.



E. G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL