IN THE COURT OF APPEAL OF TANZANIA
AT SHINYANGA

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

CRIMINAL APPEAL NO. 565 OF 2016

1. **KALIMILO MAHULA @ KUTIGA**
2. **MASUNGA SAANANE @ LAMADI** } ..... **APPELLANTS**

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the Decision of the High Court of Tanzania at Shinyanga)

(Kibella, J.)

dated the 16th day of November, 2016
in
DC Criminal Appeal No. 126 of 2015

JUDGMENT OF THE COURT

17th & 24th August, 2020

KEREFU, J.A.:

In the District Court of Bariadi at Bariadi in Simiyu Region, the appellants, KALIMILO MAHULA @ KUTIGA and MASUNGA SAANANE @ LAMADI were jointly charged with six counts under the National Parks Act [Cap. 282 R.E. 2002] (the NPA) and the Economic and Organized Crimes Control Act [Cap. 200 R.E. 2002] (the EOCCA). On the first count, the appellants were charged with the offence of unlawful entry into a national park contrary to section 21 (1) (a) and section 29 of the NPA. It was alleged in the particulars of the offence that on 11th March, 2014 at

Nyamuma hill area in Serengeti National Park within Bariadi District in Simiyu Region the appellants jointly and together entered into the national park without having any written permit from the Director of National Parks.

On the second count, they were charged with unlawful possession of weapons in a national park contrary to section 24 (1) (b) and (2) of the NPA read together with Paragraph 14 (a) of the 1st Schedule to and sections 57 (1) and 60 (2) of the EOCCA. It was alleged that on the same date and place the appellants were found in unlawful possession of weapons in the Serengeti National Park to wit one knife, one machete and five trapping wires (the weapons) without the permission from the authorized authority.

On the third count, the appellants were charged with the offence of unlawful hunting in a national park contrary to section 23 (1) of the NPA read together with Paragraph 14 (a) of the 1st Schedule to and sections 57 (1) and 60 (2) of the EOCCA. It was alleged that on the same date and place the appellants were found hunting game animals to wit; one impala, one topi and one warthog in the said national park without having any written permit from the Director of the National Parks.

As for the fourth, fifth, and sixth counts the appellants were charged with unlawful possession of Government trophies contrary to section 86 (1) (2) (c) (ii) of the Wildlife Conservation Act, No. 5 of 2009 and Paragraph 14 (d) of the 1st Schedule to and sections 57 (1) and 60 (2) of the EOCCA. On the fourth count, it was alleged that on the same date and place the appellants were jointly and together found in unlawful possession of one semi dried impala skin equivalent to one killed impala valued at TZS 635,700.00 the property of the United Republic of Tanzania without the permission from the authorized authority.

On the fifth count, it was alleged that on the same date and place the appellants were jointly and together found in unlawful possession of one semi dried skin of topi equivalent to one killed topi valued at TZS 1,304,400.00 the property of the United Republic of Tanzania without the permission from the authorized authority. On the last count, it was alleged that on the same date and place the appellants were jointly and together found in unlawful possession of one semi dried skin of warthog equivalent to one killed warthog valued at TZS 733,500.00 the property of the United Republic of Tanzania without the permission from the authorized authority. It was indicated in the charge that the offence in

the second, third, fourth, fifth and sixth count were economic crimes under the First Schedule to the EOCCA.

The appellants denied the charge laid against them and therefore, the case had to proceed to a full trial. To establish its case, the prosecution marshalled a total of four witnesses, two documentary evidence and one physical evidence. The appellants relied on their own evidence as they did not summon any witness.

In a nutshell, the prosecution case as obtained from the record of appeal indicate that, on 11th March, 2014 at about 16:00 hrs, when the Game Rangers of Serengeti National Park (the National Park) namely, Michael Komba (PW1) and Magambo Marato (PW2) were on patrol at Nyamuma hill area as part of their routine work, they heard sound of people talking inside the National Park. PW1 said, they decided to trace them and after a while they found the two appellants seated and they arrested them. PW1 stated further that they took them to Duma Post and on the following day they brought them to Bariadi Police Station where H.3354 DC Kevin (PW4) recorded their statements and later prepared the charge and brought them before the court.

At the trial, PW1 in his evidence which was supported by PW2 testified that they arrested the appellants in Nyamuma hill area in the National Park having in their possession the weapons and the Government trophies. PW1 sought to tender the weapons and despite objection by the appellants, the same were admitted in evidence as exhibit P1, collectively. Joel Yesaya (PW3) a Wildlife Officer of Maswa Game Reserve stated that, he identified the Government trophies found in possession of the appellants, valued them and prepared a valuation report. PW3 tendered the inventory and the valuation report which were admitted in evidence as exhibits P2 and P3, respectively.

In their defence, the appellants who testified as DW1 and DW2, respectively, stated that on 11th March, 2014 while tilling their land bordering the Maswa Game Reserve, they were arrested by PW1 and PW2 after they denied to know the person whose cattle grazed inside the Game Reserve. DW1 and DW2 stated that they were taken to Duma Post and on the following day they were sent to Bariadi Police Station where the charge against them was prepared and later on they were taken to court.

After a full trial, the trial court accepted the version of the prosecution's case and the appellants were found guilty, convicted and sentenced on the first count to one-year imprisonment or to pay a fine of TZS 10,000.00. On the second count they were ordered to pay a fine of TZS 20,000.00 or two-years imprisonment while on the third count they were ordered to pay a fine of TZS 50,000.00 or to three years imprisonment. On the fourth count to pay a fine of TZS 6,000,000.00- or thirty years imprisonment, on fifth count to pay a fine of TZS 13,000,000.00- or thirty years imprisonment and on the last count to pay a fine of TZS 7,000,000.00- or thirty-years imprisonment. The sentences were ordered to run concurrently.

Aggrieved, the appellants unsuccessfully appealed to the High Court where the trial court's conviction and sentence were upheld, hence the present appeal. In their two sets of memoranda, the appellants raised eight (8) grounds of appeal which, for reasons that will shortly come to light, we need not recite them herein.

At the hearing of the appeal, the appellants appeared in person without legal representation through a video facility linked to Shinyanga District Prison whereas the respondent Republic was represented by Mr.

Tumaini Kweka, learned Principal State Attorney assisted by Ms. Salome Mbughuni, learned Senior State Attorney and Mr. Nestory Mwenda, learned State Attorney.

Before we could embark on the hearing of the appeal on its merit, Mr. Kweka sought and obtained leave to argued the following preliminary points of law: -

(a) *That, the trial court's failure to disclose the role of an interpreter and the type of language used to interpret the proceedings prejudiced the parties; and*

(b) *That, the trial court lacked the requisite jurisdiction to try both economic and non-economic offences.*

Having observed that the second point of law raised by Mr. Kweka seeks to question the jurisdiction of the trial court to entertain the appellants' case, we invited Mr. Kweka to start addressing us on that point.

Submitting on that point, Mr. Kweka argued that having perused the record of appeal he realized that before the trial court, the appellants were charged with six counts, two counts of which were for non-economic offences and the other four were economic offences. He

contended that the certificate issued by the Director of Public Prosecution (the DPP) to confer jurisdiction on the District Court to entertain and hear the matter was given under section 12(3) of the EOCCA. It was his submission that, the said section was not an appropriate provision of the law under which the certificate could be issued, because in the instant case, the charge constituted a combination of both economic and non-economic offences. Mr. Kweka argued further that the appropriate provisions, in the circumstances, should have been section 12 (4) of the EOCCA. To support his proposition, he referred us to our previous decisions in the cases of **Emmanuel Rutta v. Republic,** Criminal Appeal No. 357 of 2014 and **Saidi Lyangubi v. Republic,** Criminal Appeal No. 324 of 2017.

He then argued that, since in this case the certificate conferring jurisdiction on the subordinate court to try the case was only issued under section 12 (3) of the EOCCA, the same was invalid and the trial court did not have the requisite jurisdiction to entertain the matter. On that account, Mr. Kweka submitted that the proceedings in the trial court as well as those in the first appellate court were a nullity. Based on his submission, he beseeched us to invoke the powers of revision bestowed

upon the Court under section 4 (2) of the Appellate Jurisdiction Act, Cap. 141 R.E 2019 (the AJA) to nullify the aforesaid proceedings and the judgment of both courts, quash the conviction and set aside the sentence meted out against the appellants.

On their part, this being a legal issue, the appellants, did not have much to say other than praying the Court to consider their grounds of appeal, allow the appeal and set them free. They added that, since the pointed-out anomaly was not occasioned by them, they should not be penalized. On that account, they insisted that they should be set free as they have been in prison for seven (7) years.

From the submissions made by the parties, the crucial issue for our consideration is whether the certificate conferring jurisdiction on the trial court was invalid, thus rendering the entire proceedings for both courts below a nullity.

It is on record that the charge laid against the appellants before the trial court comprised both, economic and non-economic offences. The said charge was accompanied by a DPP's consent which was issued under section 26 (2) of the EOCCA and a certificate conferring jurisdiction to the

trial court to adjudicate the case made under section 12 (3) of the same Act.

This Court on several occasions has held in a trial involving a combination of both, economic and non-economic offences, the proper provision under which the DPP's certificate is to be issued is section 12 (4) of the EOCCA. There are numerous authorities to this effect and some of them have been cited to us by Mr. Kweka in his submission. We will however, add few, such as **Rhobi Marwa Mgare and Two Others v. Republic,** Criminal Appeal No. 192 of 2005; **Niko Mhando & 2 Others v. Republic**, Criminal Appeal No. 332 of 2008; **Abdulswamadu Aziz v. Republic**, Criminal Appeal No. 180 of 2011; **Kaunguza Machemba v. Republic,** Criminal Appeal No. 1578 of 2013 and **Hashimu Athumani & Another v. Republic**, Criminal Appeal No. 260 of 2017 (all unreported). Specifically, in **Kaunguza Machemba** (supra) upon finding that the appellant was arraigned in court to answer a charge comprising both economic and non-economic offences and the certificate conferring jurisdiction to the subordinate court to try the case was issued under section 12 (3) of the EOCCA, we declared the entire proceedings a nullity.

Again, in **Said Lyangubi** (supra) when faced with an akin situation, we observed that: -

> *"There is no gain gainsaying that the certificate did not confer the requisite jurisdiction to the trial court to try the case. It goes without saying, therefore, that the trial court lacked jurisdiction to adjudicate the case. That irregularity vitiated the entire trial and the only remedy available to us, is to nullify the trial."*

Furthermore, in our recent decision in **Mabula Mboje & 2 Others v. Republic**, Criminal Appeal No. 557 of 2016 delivered on 20th August, 2020, having been confronted with a similar situation and being guided by our previous decisions, we held, at page 12 of the typed Judgment, that: -

> *"In view of the fact that the Certificate by the DPP...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."*

Similarly, in the instant case, there is no gainsaying that the trial court lacked jurisdiction to adjudicate on the case. The irregularity vitiated the entire trial hence renders the trial proceedings a nullity so, were the proceedings and judgement in the appeal before the High Court, as they stemmed from nullity proceedings.

That being the position, we hereby invoke the revisional powers under section 4 (2) of the AJA and nullify the proceedings and the judgements of both the trial court and the High Court, quash the appellants' convictions and set aside the sentences imposed on them.

Since the finding of the above point alone suffices to dispose of the appeal, the need for considering the other point of law raised by Mr. Kweka does not arise.

The subsequent question which crops from the foregoing position is on what should be the way forward. Ordinarily, where the proceedings of the trial court have been nullified on appeal, the common practice and procedure is to order for a retrial. Nonetheless, there are some factors which have to be considered before an order for a retrial is made. The guidance, which in our view did sum up the criteria for ordering a retrial

or not, was given in the case of **Fatehali Manji v. Republic**, [1966] EA 343 when the Court stated that: -

> *"...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 retriai 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 added].*

Following the above authority, we hasten to remark that this is not a fit case to make an order for a retrial. Upon dispassionately scrutinizing the entire evidence on record from either side, we were able to note other irregularities and unfolded deficiencies in the prosecution evidence which shade doubts that if given the opportunity there is likelihood for the prosecution filling in gaps. Certainly, the record of the trial court is silent on the procedure used to dispose of the Government trophies

alleged to have been found in the appellants' possession. In addition, the certificate of valuation (Exhibit P2) and the inventory (Exhibit P3) were un-procedurally handled as they were not read out and or explained to the appellants after their admission in evidence. Having regard to these shortfalls and considering the guidance given in **Fatehali Manji** (supra), we do not find it appropriate to order for a retrial.

In the event, we order the immediate release of the appellants from prison forthwith unless they are held for some other lawful cause.

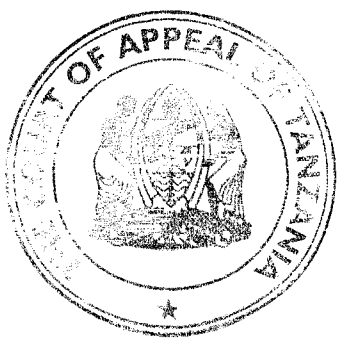
DATED at **SHINYANGA** this 24th day of August, 2020.

A.G. MWARIJA
JUSTICE OF APPEAL

J.C.M. MWAMBEGELE
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

The Judgment delivered this 24th day of August, 2020 in presence of the Appellants via Video link and Jukael Reuben Jairo, learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.



E. G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL