IN THE COURT OF APPEAL OF TANZANIA

AT SHINYANGA

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

CRIMINAL APPEAL NO. 224 OF 2017

1. DOTTO MAYALA @ MASUNGA
2. MANGU KUYELA @ NDOGANI ..... APPELLANTS

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Makani, J.)

dated the 23rd day of December, 2016
in
DC. Criminal Appeal No. 90 of 2016
.....

RULING OF THE COURT

21st & 28th August, 2020

MWARIJA, J.A.:

This appeal arises from the decision of the High Court of Tanzania at Shinyanga (Makani, J.) in Criminal Appeal No. 90 of 2016 dated 23/12/2016. In that appeal, the High Court upheld the decision of the District Court of Bariadi in Economic Crime Case No. 15 of 2016 in which the appellants, Dotto Mayala @ Masunga and Mangu Kuyela @ Ndogani (1st and 2nd appellants respectively) were charged with and convicted of

one count under the Wildlife Conservation Act No. 5 of 2009 (the WCA) and five counts under the Economic and Organized Crime Control Act [Cap. 200 R.E. 2002] (the EOCCA).

In the first count, they were charged with unlawful entry into a game reserve contrary to s. 15 (1) and (2) of the WCA; that on 10/4/2016 at about 13:00 hrs at Mto Tei area, they were found to have entered in Maswa Game Reserve within Bariadi District in Simiyu Region without any written permit from the Director of Wildlife.

In the second count, they were charged with unlawful possession of weapons in a game reserve contrary to s. 17 (1) and (2) of the WCA read together with paragraph 14 (c) of the First Schedule to and ss. 57 (1) and 60 (2) of the EOCCA. It was alleged that on the same date, time and place stated in the first count, they were found in possession of two knives, two machetes one axe and eight animal trapping wires (the weapons) without any permit and without satisfactory explanation that the same were intended to be used for the purpose other than hunting, killing, wounding or capturing animals.

The appellants were also charged in the third and sixth counts with the offences of unlawful hunting contrary to s. 19 (1) and (2) (c) of the

WCA read together with paragraph 14 (a) of the First Schedule to and ss. 57 (1) and 60 (2) of the EOCCA, and possession of Government trophies contrary to s. 86 (1) (2) (b) of the WCA read together with paragraph 14 (d) of the First Schedule to and ss. 57 (1) and 60 (2) of the EOCCA respectively. It was alleged that, on the same date, time and place as stated in the first count, the appellants hunted one giraffe, four impala and two wildbeests and had in their possession, nine pieces of dried giraffe meat and one dried giraffe tail equal to one killed giraffe value at USD 15,000.00, equivalent to TZS 32,805,000.00, eight pieces of dried wildbeest meat and two tails of wildebeest, equal to two killed wildbeests value at USD 1,300.00 which is equivalent to TZS 2,843,100.00, eight dried pieces of impala meat and four dried impala skins equal to four killed impala valued at USD 1,560.00, which is equivalent to TZS 3,411,720.00, (the Government trophies) all of which are the properties of the Tanzania Government.

The appellants denied all counts. After a full trial at which the prosecution relied on the evidence of four witnesses while the appellants depended on their own evidence in defence, the trial court found that the case had been proved. Evidence on the part of the prosecution was

adduced by, among others, Musa Mtani and Baraka Zefania (PW1 and PW2 respectively) who were, until the material time, Game Officers employed by Maswa Game Reserve (the Game Reserve). In his evidence, PW1 testified that while in patrol with PW2, they arrested the appellants in the Game Reserve and when he interrogated them, the appellants admitted that they did not have any permit which authorized them to enter into that area.

It was PW1's evidence further that the appellants were also found having in their possession, the weapons and the Government trophies. He added that when they were asked to give explanation as regards the purpose of entering into the Game Reserve with the weapons and whether they had any permit authorizing them to possess the Government trophies, they failed to produce any permit or give satisfactory explanation that the weapons were not intended to be used for hunting animals. On his part, PW2 supported the evidence adduced by PW1.

Another witness, David G. Sule (PW3) who was at the material time the District Game Officer, Bariadi, testified that he identified the trophies and prepared a valuation report. He tendered the inventory and valuation report which were admitted in evidence as exhibits P3 and P4 respectively.

In their defence, the appellants denied having been arrested in the Game Reserve or being found in possession of the weapons and Government trophies. The 1st appellant (DW1) testified that he was arrested by game officers while together with the 2nd appellant (DW2), were constructing their house outside the Game Reserve. He said that their machetes, an axe, a tent, a bucket and cooking pots were seized by the game officers who also ordered the appellants to go to where a motor vehicle belonging to the Game Reserve had been parked. Having arrived there, they were shown some pieces of meat which they were ordered to carry on account that they belonged to them. He added that when they refused, they were beaten and thus agreed to carry the meat. They were taken to Bariadi police station where they were later charged. DW2 supported the evidence of DW1 in almost all material aspects.

At the conclusion of the trial, the trial court was satisfied with the evidence of the prosecution witnesses and therefore, as stated above, convicted the appellants as charged. Following their conviction, they were each sentenced to pay a fine of TZS 100,000.00 or one year imprisonment in each of the first, second and third counts and a fine of TZS 328,050,000.00 or twenty years imprisonment in the fourth count. In the

fifth count they were sentenced to pay a fine of TZS 5,686,200.00 or twenty years imprisonment while in the sixth count, they were sentenced to pay a fine of TZS 6,823,440.00 or twenty years imprisonment.

They were aggrieved by the conviction and sentence and therefore appealed to the High Court. Their appeal against conviction was dismissed. As to sentence, the learned first appellate Judge observed that the record of the trial court is silent as to whether or not the sentences were to run concurrently. She therefore, ordered the imprisonment sentences to run concurrently. She also substituted the sentence of fine in the fourth count with a fine of TZS 32,805,000.00 from TZS 328,050,000.00 imposed by the trial court. In doing so, she observed that, since the value of the Government trophies in that count was shown to be TZS 32,805,000.00, there was typographical error in the amount of the fine imposed by the trial court.

In this appeal, the appellants filed a joint memorandum of appeal containing eight grounds. However for the reasons which will be apparent herein, we will not consider them.

On 21/8/2020 when the appeal was called on for hearing, the 2nd appellant who was not represented, appeared in person through video

conferencing linked to Shinyanga District Prison. On its part, the respondent Republic was represented by Mr. Tumaini Kweka, learned Principal State Attorney assisted by Mses. Edith Tuka and Caroline Mushi and Mr. Mafuru Moses, all learned State Attorneys. The 1st appellant did not enter appearance. By his letter dated 13/8/2020, the Officer In-charge of Shinyanga District Prison informed the Court that the said appellant passed away on 28/9/2018. He attached the deceased's burial permit showing that he died on the said date. In the circumstances, we invoked Rule 78 (1) of the Tanzania Court of Appeal Rules, 2009 and marked the 1st appellant's appeal as having abated.

Having done so, before we could proceed to hear the appeal in respect of the 2nd appellant, Mr. Moses rose and informed us that he had a point of law to argue. Having been granted leave, the learned State Attorney submitted that the trial court did not have jurisdiction to try the case because the charge involved both economic and non-economic offences. He argued that although the DPP had issued a certificate conferring the trial court the jurisdiction to hear the economic offences charged, the certificate was issued under s. 12 (3) of the EOCCA. According to Mr. Moses, the certificate ought to have been issued under s.

12 (4) of the EOCCA which is the proper provision where the charge combines economic and non-economic offences to be tried by a subordinate court. To buttress his argument, the learned State Attorney cited our recent decision in the case of **Mabula Mboje and 2 others v. Republic**, Criminal Appeal No. 557 of 2016 (unreported).

In the premises, Mr. Moses implored upon us to find that the certificate which was issued under s. 12 (3) of the EOCCA was invalid and did not confer jurisdiction on the trial court. In the circumstances, he went on to argue, the proceedings conducted in that court were a nullity. He thus urged us to invoke the Court's revisional Jurisdiction under s. 4 (2) of the Appellate Jurisdiction Act [Cap. 141 R.E. 2019] (the AJA) and quash the proceedings and judgments of the District Court of Bariadi and the High Court as well as the conviction of the appellant and set aside the sentence. As for the way forward, the learned State Attorney submitted that an order of retrial will not be appropriate in the circumstances of this case.

The appellant did not have anything in response to the submission made by the respondent on that point of law. He merely prayed to be released from prison.

As submitted by Mr. Moses, the DPP's certificate which conferred jurisdiction on the trial court was issued under s. 12 (3) of the EOCCA which provides as follows:-

> *"12 - (1) .... N/A*
> *(2) .... N/A*
> *(3) The Director of Public Prosecutions or any State Attorney duly authorised 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."*

In the case of **Mabula Mboje and 2 others** (supra) cited by Mr. Moses, we observed that, where the charge is one combining economic and non-economic offences, the DPP's certificate conferring subordinate court jurisdiction, becomes valid if it is issued under s. 12 (4) of the EOCCA. That provision states as follows:-

> *"12 -(1) .... N/A*
> *(2) .... N/A*
> *(3) .... N/A*

(4) The Director of Public Prosecutions or any State Attorney dully authorised 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 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."

In the case which was cited by Mr. Moses, **Mabula Mboje and 2 others** (supra), we took that position guided by our earlier decisions in, among others, the cases of **Niko Mhando and 2 others v. Republic**, Criminal Appeal No. 332 of 2008, **Emmanuel Rutta v. Republic**, Criminal Appeal No. 148 of 2011 and **Abraham Adamson Mwambene v. Republic**, Criminal Appeal No. 148 of 2011 (all unreported).

In the case of **Abraham Adamson Mwambene** (supra), the Court stated as follows:-

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

Similarly, in the case of **Emmanuel Rutta** (supra), we observed that:-

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

On the basis of the position shown above, we agree with the learned State Attorney that the trial court lacked jurisdiction to try a combination of economic and non-economic offences facing the appellant. In the circumstances, we find that the proceedings of the trial court were a nullity. As a result, in the exercise of the powers conferred in the Court under s. 4 (2) of the AJA we hereby nullify the proceedings and judgments of the two courts below quash the appellant's conviction and set aside the sentence.

On the way forward, we agree with the learned State Attorney that in the particular circumstances of this case, an order of retrial is not

appropriate. From the record, there are a number of anomalies which in our considered view, makes an order of retrial inappropriate. First, at page 17 of the record of appeal, PW3 tendered the inventory form and valuation certificate of the Government trophies (exhibits P3 and P4 respectively). After admission of exhibits P3 and P4, the same were not read over to the appellant. The omission renders the exhibits invalid and therefore expungeable. – See for example the cases of **Robinson Mwanjisi and others v. Republic** [2003] TLR 218, **Semeni Mgonda Chiwanza v. Republic**, Criminal Appeal No. 49 of 2019 and **Emmanuel Kondrad Yosipati v. Republic**, Criminal Appeal No. 296 of 2017 (both unreported). In the case of **Robinson Mwanjisi** (supra) the Court stated that principle as follows:-

> *"Whenever it is intended to introduce any document in evidence, it should first be cleared for admission and be actually admitted, before it can be read out. Reading out document before they are admitted in evidence is wrong and prejudicial."*

Secondly, PW1 who tendered the weapons did not explain how they were handled from the time of their seizure to the time of production in

court and their description so as to prove that they are the same items found in possession of the appellants.

Now therefore, if a retrial is ordered, the prosecution will get the opportunity of filling in the gaps and that will not serve the interests of justice. For these reasons, we agree with Mr. Moses that an order of retrial is inappropriate.

In the event, we order that the appellant Mangu Kuyela @ Ndogani be released from prison forthwith unless he is otherwise lawfully held.

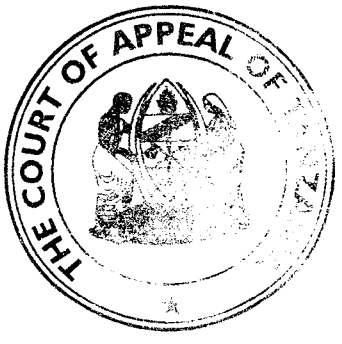
DATED at **SHINYANGA** this 27th day of August, 2020.

A. G. MWARIJA
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

The ruling delivered this 28th day of August 2020, in the presence of 2nd Appellant appeared in person via video link and Mr. Jukael Reuben Jairo, learned State Attorney for the Respondent, is hereby certified as a true copy of the original.



E. G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL