IN THE COURT OF APPEAL OF TANZANIA
AT SHINYANGA

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

CRIMINAL APPEAL NO. 228 OF 2017

MADUHU MASHANGI..... APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Ruhangisa, J.)

dated the 17th day of February, 2017
in
DC Criminal Appeal No. 66 of 2016

JUDGMENT OF THE COURT

26th & 28th August, 2020

KEREFU, J.A.:

In the District Court of Bariadi, the appellant, Maduhu Mashangi was charged with four counts under the Wildlife Conservation Act No. 5 of 2009 (the WCA) and the Economic and Organized Crime Control Act [Cap. 200 R.E. 2002] (the EOCCA). On the first count, the appellant was charged with the offence of unlawful entry into a Game Reserve contrary to section 15 (1) and (2) of the WCA. It was alleged in the particulars of the offence that on 7th August, 2014 at about

07:30 hrs at Mamarehe River area in Maswa Game Reserve within Bariadi District in Simiyu Region the appellant entered into the said area without having any written permit from the Director of Wildlife.

On the second count, the appellant was charged with the offence of unlawful hunting in a Game Reserve contrary to section 19 (1) and (2) of the WCA read together with Paragraph 14 (a) of the 1st Schedule to the EOCCA. It was alleged that on the same date, time and place the appellant was found hunting animals to wit; one zebra, one buffalo and one waterbuck in the Game Reserve without having any written permit from the Director of Wildlife.

As for the third and fourth counts, the appellant was charged with the offence of unlawful possession of Government trophies contrary to section 86 (1) (2) (b) of the WCA read together with Paragraph 14 (d) of the 1st Schedule to the EOCCA. On the third count, it was alleged that on the same date, time and place the appellant was found in unlawful possession of Government trophies to wit; one carcass of zebra equivalent to one killed zebra valued at TZS 1,980,000.00 and two horns of buffalo equivalent to one killed buffalo

valued at TZS 3,135,000.00, total value at TZS 5,115,000.00 the property of the Government of the United Republic of Tanzania.

On the fourth count, it was alleged that on the same date, time and place the appellant was found in unlawful possession of Government trophies to wit; two horns of a waterbuck equivalent to one killed waterbuck valued at TZS 1,402,500.00 the property of the Government of the United Republic of Tanzania. It was indicated in the charge that the offence in the second, third and fourth counts were economic crimes under the First Schedule to the EOCCA.

The appellant denied the charge laid against him and therefore, the case had to proceed to a full trial. To establish its case, the prosecution paraded a total of two witnesses, two documentary evidence and one physical evidence. The appellant relied on his own evidence as he did not summon any witness.

The material facts leading to the appellant's arrest as obtained from the record of the appeal indicate that, on 7th August, 2014 at about 07:30 hrs when Kennedy Francis Lumato (PW2); a Game Officer of Maswa Game Reserve was patrolling the Game Reserve, he

arrested the appellant after he found him in possession of the Government trophies and weapons without any valid permit. PW2 testified that he took the appellant to Nyasosi Game Post and later on to Bariadi Police Station for interrogation. PW2 sought to tender the weapons which were admitted in evidence as exhibit P3, collectively.

Jesca Mathias (PW1) a Game Officer stated that, he identified the Government trophies allegedly found in possession of the appellant, valued them and prepared a valuation report. PW3 tendered the inventory and the valuation report which were admitted in evidence as exhibits P1 and P2, respectively.

After a full trial, the trial court though found the appellant guilty and convicted him on all counts, it only sentenced him on the second, third and fourth counts as follows: on the second count the appellant was ordered to pay a fine of TZS 200,000.00 and in default to serve one-year imprisonment. On the third count to pay a fine of TZS 5,115,000.00 and in default to serve twenty years imprisonment while on the fourth count the appellant was ordered to pay a fine of TZS

1,000.000.00 and in default to serve a jail term of twenty years. The said sentences were to run concurrently.

Aggrieved by the decision of the trial court, the appellant unsuccessfully appealed to the High Court of Tanzania at Shinyanga where Ruhangisa, J. dismissed his appeal in its entirety on 17th February, 2017. However, upon discovering that the trial court did not sentence the appellant on the first count, he remitted the file to the trial court to enter sentence on that count. Still protesting his innocence, the appellant has knocked doors of this Court on a second appeal seeking to challenge the decision of the first appellate court. In his memorandum of appeal, the appellant raised six (6) 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 appellant appeared remotely in person without legal representation through a video conference facility linked to Shinyanga District Prison. The respondent Republic was represented by Mr. Tumaini Kweka, Principal State Attorney assisted

by Ms. Edith Tuka, Mr. Mafuru Moses and Mr. Nestory Mwenda, all learned State Attorneys.

When invited to argue his appeal, the appellant preferred to let the respondent to respond first but he reserved his right to rejoin, if need to do so would arise. In the circumstances, we invited Mr. Kweka to commence his submission.

Upon taking the floor, Mr. Kweka, from the outset, declared their stance of supporting the appeal on a point of law pertaining to the jurisdiction of the trial court in entertaining the matter: - *That, the trial court lacked the requisite jurisdiction to try a combination of economic and non-economic offences.* As such, Mr. Kweka sought and obtained leave to address us on that legal point.

Elaborating on that point, Mr. Kweka argued that before the trial court, the appellant was charged with four counts, one count of which was for non-economic offence and the other three were economic offences. He referred us to page 4 of the record of appeal and argued 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 argument 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 **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 and **Emmanuel Rutta v. Republic,** Criminal Appeal No. 357 of 2014.

In addition, and for purposes of cementing his proposition, Mr. Kweka also referred us to our unreported recent decisions in the cases of **Mabula Mboje & 2 Others v. Republic,** Criminal Appeal No. 557 of 2016 and **Kalimilo Mahula @ Kutiga v. Republic,** Criminal Appeal No. 565 of 2016, we delivered in the course of this session on 20th and 24th August, 2020 respectively.

He then argued that, since in this case the certificate conferring jurisdiction on the subordinate court to try the case was 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. He thus implored 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 below, quash the conviction and set aside the sentences meted out against the appellant.

The way forward on the matter was submitted by Mr. Mwenda. In his submission, Mr. Mwenda was hesitant to press for an order for retrial on account of procedural irregularities apparent on the face of record and the weakness of the prosecution case. Mr. Mwenda pointed out three main irregularities committed during the trial. **First**, that, both inventory and certificate of valuation (exhibits P1 and P2) were not read out to the appellant after they were cleared and admitted in evidence to enable the appellant to understand its contents.

Second, that, PW1 who identified the Government trophies did not sufficiently describe them and explain how he seized them from the appellant. Mr. Mwenda argued that, it was not clear as to whether the Government trophies exhibited before the trial court were the same Government trophies alleged to have been seized from the appellant. The learned State Attorney also submitted that, it was even not clear as to whether the appellant was involved in the process of disposal of the same as the record of the trial court is silent on that aspect, and **Third**, that, PW2 was not able to describe the weapons he exhibited in the trial court (exhibit P3) to ascertain whether they were the same weapons alleged to have been seized from the appellant. It was the submission of Mr. Mwendwa that those irregularities are critical in the prosecution case able to cause it to collapse. He thus refrained from pressing for an order of retrial and instead he prayed that the appellant be set free.

On his part, the appellant did not have much to contribute to the legal issue raised by the learned Principle State Attorney but he agreed with the proposed way forward. On that account, he prayed for his appeal to be allowed and that he be set at liberty.

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 of both courts below a nullity.

It is on record that the charge laid against the appellant 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 that, in a trial by a subordinate court 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 **Abdulswamadu Aziz v. Republic**, Criminal Appeal No. 180 of 2011; **Kaunguza Machemba v. Republic,** Criminal Appeal No. 157B

of 2013; **Saidi Lyangubi v. Republic,** Criminal Appeal No. 324 of 2017 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** (supra) cited to us by Mr. Kweka, after being 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 certificate of the DPP conferring jurisdiction to the subordinate court was issued under section 12 (3) and therefore, 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 appellant's conviction and set aside the sentences imposed on him.

On the way forward we hasten to entirely and respectfully agree with Mr. Mwenda that this is not a fit case for us to make an order for a retrial. The articulated irregularities and unfolded deficiencies in the prosecution case shade doubts that, if the prosecution is given the opportunity there is likelihood of filling in gaps. Certainly, 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 appellant after their admission in evidence.

Furthermore, and as argued by Mr. Mwenda, there was no clear and cogent evidence that the exhibited weapons (exhibit P3) were the ones alleged to have been seized from the appellant as the same were tendered before the trial court by PW2 who did not explain or even describe the same. In addition, 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 appellant's possession. In our considered view, all these are crucial matters which, as argued by Mr. Mwenda, if an order for retrial is given will avail an opportunity to the prosecution to fill in gaps.

In the circumstances, we are increasingly of the view that a retrial order is likely to prejudice the appellant as we held in the case of **Fatehali Manji v. Republic** [1966] EA 343, at page 344, 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 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 added].*

Being guided by the above authority, we do not find it appropriate to order for a retrial.

Since the finding of this point suffices to dispose of the appeal, we find no need to consider the grounds of appeal raised by the appellant.

In the event, we order the immediate release of the appellant from prison forthwith unless he is held for some other lawful cause.

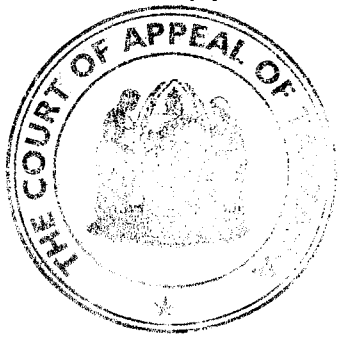
DATED at **SHINYANGA** this 27th day of August, 2020.

A.G. MWARIJA
JUSTICE OF APPEAL

J.C.M. MWAMBEGELE
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

The Judgment delivered this 28th day of August, 2020 in presence of the Appellant 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