IN THE COURT OF APPEAL OF TANZANIA
AT TANGA

(CORAM: LILA, J. A., SEHEL, J. A., And KITUSI, J.A.)

CRIMINAL APPEAL NO. 87 OF 2020

ALLY s/o SALIM @ NYUKU..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Decision of the High Court of Tanzania, at Tanga)

(Aboud, J.)
dated the 8th day of June, 2018
in
(DC) Criminal Appeal No. 4 of 2018

.....

JUDGMENT OF THE COURT

17th & 23rd September, 2020

SEHEL, J.A.:

The appellant, Ally s/o Salim @ Nyuku, was arraigned before the District Court of Lushoto at Lushoto (the trial court) with eight counts. **Two counts** of unlawful possession of Government Trophy contrary to section 86 (1) and (2) (b) of the Wildlife Conservation Act of 2009 (WCA) read together with Paragraph 14 (d) of the First Schedule of the Economic and Organized Crime Control Act, Cap. 200 R.E 2002 (EOCCA); **one count of** unlawful possession of Government Trophy

contrary to section 86 (1) and (2) (c) (iii) of the WCA as amended by the Written Laws Miscellaneous Amendments Act No. 2 of 2016 read together with Paragraph 14 (d) of the First Schedule of the EOCCA; **four counts of** unlawful possession of weapon contrary to section 103 of the WCA read together with Paragraph 14 (c) of the First Schedule of the EOCCA and **one count of** unlawful entry in the National Park contrary to sections 21 (1) (a), (b), (2) and 29 (1) of the Tanzania National Parks Act, Cap. 282 R.E 2002.

After a full trial, the appellant was convicted with 3rd, 4th, and 5th counts which were on unlawful possession of weapon. He was also convicted with unlawful entering in the National Parks (6th count) and unlawful possession of Government Trophy (7th count). He was sentenced as follows:

3rd count: to pay fine of TZS 500,000 or to serve two (2) years in prison in default.

4th count: to pay fine of TZS 500,000 or to serve two (2) years in prison in default.

5th count: to pay fine of TZS 500,000 or to serve two (2) years in prison in default.

6th count: to pay fine of TZS 10,000 or to serve one (1) year in prison in default.

7th count: to pay fine of TZS 54,000,000 or to serve twenty (20) years in prison in default.

Dissatisfied, he unsuccessfully appealed in the High Court of Tanzania at Tanga (the first appellate court) hence this present appeal.

The facts giving rise to the appellant's conviction and sentence are such that; on 21st September, 2015 at about afternoon hours Nasibu Martin Sadoka (PW1) a game guard at Mkomazi National Park whilst on patrol with his co-workers namely Richard Amosi Erasto (PW2) and Ramadhani Mbaga (PW4) saw footsteps of a human being. They followed up and found the appellant in his camp. The appellant was found with a knife, a bush knife, a leg of a giraffe, warthog meat and 50 wires snares for trapping animals. They asked him if he had any permit of entering in the National Park and hunt, he said he did not have one. They arrested him and took him to Lushoto police station for further legal steps. On the next day, they went to the appellant's house at Mbuyuni village together with E. 1573 D/CPL

Warioba to conduct search. The sub-village leader, Makaba Juma (PW7) was summoned to witness the search. He said, the appellant was searched and found with one horn, six horns of lesser kudu and three wires. After the search, a search warrant was filled and signed by the witnesses. The appellant was then taken back to Lushoto police station where he was interrogated by PW3 and he confessed to have been found in the National Park with wires for trapping small animals. The exhibits fetched on 21st September, 2015 which were 50 wires, a torch, a knife, and a bush knife were handed to E. 2006 Coplo Ahmed (PW6), the exhibits keeper for safe custody. On the next day, six horns and 3 wires were also brought to PW6 for safe keeping.

Tadeo Simon (PW5), a District Game Valuer, on 22nd September, 2015 was called at Lushoto Police station to value the trophies which the appellant was found in possession of. PW5 told the trial court that a Giraffe at that time worth USD 15,000 equals to TZS 31,500,000; warthog worth USD 450 equals to TZS 945,000 and six horns of lesser kudus were TZS 16,380,000.

In his defence evidence, the appellant strongly denied any involvement in the commission of the alleged offences. He said, at the

time of his arrest he was at a village neighbouring the National Park, at Ngomei village for the work of digging water dams. He maintained that the Government Trophy and weapons were planted to him by the game officers upon failure to name the poachers.

As alluded earlier, the trial court found that the evidence of the prosecution, especially the evidence of PW1, PW2, PW3, PW4 and PW7 proved beyond reasonable doubt the three offences which the appellant was charged with. Thus, the appellant was found guilty and convicted for being in unlawful possession of six horns of lesser kudu, unlawful possession of weapon in Mkomazi National Park and unlawful entry in the National Park. He was sentenced as stated earlier.

His appeal on the conviction to the first appellate court was dismissed but on sentence it was partly allowed since the sentence of fine on the 7th count was reduced from TZS 54,000,000 to TZS 16,380,000. In quest of his innocence, the appellant has come to this Court armed with nine grounds of appeal. However, for a reason soon to be unfolded, we shall not reproduce the grounds of appeal.

At the hearing of the appeal, the appellant appeared in person, unrepresented, via video link conference from Karanga Central Prison,

Moshi. Mr. Waziri Magumbo assisted by Ms. Donata Kazungu, both learned State Attorneys, appeared for the respondent/Republic.

Before the appeal could proceed on merit, we wanted to satisfy ourselves as to whether the trial court had jurisdiction to try the case given the fact that the charging provisions cited in the consent and in the certificate conferring jurisdiction on subordinate court differ with the charge sheet. We further noted that the certificate conferring jurisdiction on subordinate court was issued under section 12 (3) of the EOCCA that deals with economic offences only whereas the appellant's trial dealt with both economic and non-economic offences.

Ms. Kazungu readily conceded that both the consent and certificate did not confer jurisdiction to the subordinate court that tried the appellant's case. Elaborating on it, she pointed out that both the consent and certificate express that the appellant contravened the provisions of Paragraph 4 (1) (a) of the First Schedule to, and sections 57 (1) and 60 (2) of the EOCCA which is not the case. She added that, according to the charge sheet, the appellant was alleged to have contravened the provisions of sections 86 (1), (2) (b) and (2) (c) (iii) of the WCA read together with Paragraph 14 (d) of the First Schedule

of the EOCCA. As such, she said, the offences which the appellant was charged were neither consented to by the Director of Public Prosecutions (D.P.P) nor authorized by the D.P.P to be tried by the subordinate court. In that regard, she urged us to declare the proceedings of the trial court and of the first appellate court a nullity in terms of our revisional powers enshrined under section 4 (2) of the Appellate Jurisdiction Act, Cap. 141 of 2019 (AJA) and to quash the conviction and set aside the sentences and orders issued thereof.

Ms. Kazungu, further, submitted that the appellant was arraigned in the District Court of Lushoto at Lushoto on a charge comprised of eight counts which some of them were economic and others were non-economic offences. It was the view of Ms. Kazungu that the certificate which was issued under section 12 (3) of EOCCA did not confer jurisdiction in a subordinate court to try both economic and non-economic offences. She argued that section 12 (3) of the EOCCA does not deal with a situation where there are both economic and non-economic offences like in the present matter. It only deals with a situation where there is an economic offence only. In the present matter, the certificate ought to be issued under section 12 (4) of the

EOCCA that covers both economic and non-economic offences. In the circumstances, she prayed for the Court to invoke its revisional powers under section 4 (2) of the AJA and nullify the proceedings and judgments of the trial court and that of the High Court, quash the conviction and set aside the sentences and orders imposed on the appellant.

When asked as to the way forward, she hesitated and sought assistance from Mr. Magumbo. Mr. Magumbo was forthright that according to the circumstances of the case an order of a retrial was not a just cause to take. He thus urged us to set free the appellant and if the D.P.P would deem it fit to re-arrest and recharge him he would do so. When asked by the Court as to whether the D.P.P could re-arrest and recharge a person discharged by the Court without there being an order from the Court, he was quick to urge us to follow the position we took in the case of **Emmanuel Rutta v. Republic**, Criminal Appeal No. 357 of 2014 (unreported) where we released the appellant and we left the fate of the appellant to be dealt with by the D.P.P.

On his part, the appellant prayed to be released from prison custody.

From the submission made by the learned State Attorneys we have been invited to consider as to whether the consent and certificate issued by the State Attorney-In Charge validly authorized and sanctioned the trial before the District Court of Lushoto at Lushoto involving both economic and non-economic offence.

As alluded herein, the appellant stood charged in the District Court of Lushoto at Lushoto with eight counts. He was alleged to contravene sections 86 (1) and (2) (b) of the Wildlife Conservation Act of 2009 (WCA) read together with Paragraph 14 (d) of the First Schedule of the Economic and Organized Crime Control Act, Cap. 200 R.E 2002 (EOCCA); unlawful possession of Government Trophy contrary to section 86 (1) and (2) (c) (iii) of the WCA as amended by the Written Laws Miscellaneous Amendments Act No. 2 of 2016 read together with Paragraph 14 (d) of the First Schedule of the EOCCA; and unlawful possession of weapon contrary to section 103 of the WCA read together with Paragraph 14 (c) of the First Schedule of the EOCCA. He was also charged with an offence of unlawful entry in the

National Park contrary to sections 21 (1) (a), (b), (2) and 29 (1) of the Tanzania National Parks Act, Cap. 282 R.E 2002.

Under section 26 of the EOCCA, the consent of the Director of Public Prosecutions has to be given first before the commencement of prosecution and/or trial of any case involving economic offence. For ease of reference, we reproduce sub-sections (1) and (2) to section 26 of EOCCA thus:

> *"26 (1) Subject to the provisions of this section, no trial in respect of an economic offence may be commenced under this Act save with the consent of the Director of Public Prosecutions.*
> *(2) The Director of Public Prosecutions shall establish and maintain a system whereby the process of seeking and obtaining of his consent for prosecutions may be expedited and may, for that purpose, by notice published in the Gazette, specify economic offences the prosecutions of which shall require the consent of the Director of Public Prosecutions in person and those the power of consenting to the prosecution of which may be exercised by such officer or officers subordinate to him as he may*

specify acting in accordance with his general or special instructions."

In the instant appeal, the consent which is appearing at page 7 of the record of appeal was issued by Saraji R. Iboru, the learned State Attorney In-charge by virtue of the powers conferred to him by the D.P.P in terms of section 26 (2) of the EOCCA. As rightly observed by the learned State Attorney, that consent shows that the appellant contravened the provisions of Paragraph 4 (1) (a) of the First Schedule to, and sections 57 (1) and 60 (2) of the EOCCA whereas the charges which the appellant stood charged were for contravening the provisions of sections 86 (1), (2) (b) and (2) (c) (iii) of the WCA read together with Paragraph 14 (d) of the First Schedule of the EOCCA. We are, therefore, in full agreement with her that the economic offences which the appellant stood charged with were not consented to by the D.P.P. Consequently, the trial of the appellant commenced without the sanction of the DP.P. which is contrary to section 26 of the EOCCA.

This Court in its various decisions has emphasized the compliance with the provisions of section 26 of the Act and held that the consent of the D.P.P must be given before the commencement of

a trial involving an economic offence. For instance, see the cases of **Paulo Matheo v. The Republic** [1995] TLR 144, **Rhobi Marwa Mgare and Two Others v. The Republic**, Criminal Appeal No. 192 of 2005, **Elias Vitus Ndimbo and Another v. The Republic**, Criminal Appeal No. 272 of 2007, **Peter Allen Moyo v. The Republic**, Criminal Appeal No. 397 of 2015 and **Madeni Nindwa v. The Republic**, Criminal Appeal No. 350 of 2016 (all unreported).

In the case of **Paulo Matheo v. The Republic** (supra) the trial of the appellant in the District Court of Dodoma began as an ordinary trial and he was charged with six other persons on two counts involving robbery and unlawful possession of a firearm. The trial began without the consent of the D.P.P. In the middle of the trial, after nine prosecution witnesses had given evidence, the character of the offences was changed to economic crimes and the Director of Public Prosecutions filed both the transfer of the offences and his consent as required by s 26 (1) of the Economic and Organised Crime Control Act, 1984. Five accused were acquitted in both counts, the appellant and the fourth accused were also acquitted on the first count but were convicted on the second count i.e. unlawful

possession of firearm, and were sentenced to fifteen years imprisonment. On appeal to the High Court at Dodoma, the appeal of the fourth accused was allowed and he was set free, the appellant's appeal was only partially successful in that the sentence was reduced to seven years imprisonment, his conviction was confirmed. On a second appeal to this Court, it was held: -

> *"The consent of the Director of Public Prosecution must be given before any trial involving an economic offence can commence; the DPP cannot consent retrospectively."*

Therefore, in the instant appeal, we are inclined to go along with Ms. Kazungu's submission that in the absence of the D.P.P's consent to commence the proceedings against the appellant involving economic offences, the trial court lacked the requisite jurisdiction to try the case. For that reason, we declare the proceedings of the trial court and the first appellate court a nullity.

In the same vein, we concur with Ms. Kazungu that the certificate by Saraji R. Iboru, the State Attorney In-charge appearing at page 8 of the record of appeal did not confer jurisdiction to a

subordinate court to try both economic and non-economic offences. We say so for two main reasons. **One**, as it was in the consent, we have compared the provisions of the law cited in the certificate with the ones appearing in the charge, we found that they differ. The certificate indicates that the appellant contravened the provisions of Paragraph 4 (1) (a) of the First Schedule to, and sections 57 (1) and 60 (2) of the EOCCA whereas the charge alleged that the appellant contravened sections 86 (1), (2) (b) and (2) (c) (iii) of the WCA read together with Paragraph 14 (d) of the First Schedule of the EOCCA.

Two, there is no doubt that section 12 (3) of the EOCCA, cited by the State Attorney In-charge in his certificate, deals with conferring jurisdiction on a subordinate court to try pure economic offence. That provision reads:

> "(3) *The Director of Public Prosecutions or any State Attorney duly authorized 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.

However, the appellant, in this appeal, was facing a trial in the District Court of Lushoto at Lushoto which was mixed with economic and non-economic offences. The economic offences were unlawful possession of Government Trophy contrary to section 86 (1) and (2) (b) of the Wildlife Conservation Act of 2009 (WCA) read together with Paragraph 14 (d) of the First Schedule of the Economic and Organized Crime Control Act, Cap. 200 R.E 2002 (EOCCA); unlawful possession of Government Trophy contrary to section 86 (1) and (2) (c) (iii) of the WCA as amended by the Written Laws Miscellaneous Amendments Act No. 2 of 2016 read together with Paragraph 14 (d) of the First Schedule of the EOCCA; and unlawful possession of weapon contrary to section 103 of the WCA read together with Paragraph 14 (c) of the First Schedule of the EOCCA. The offence of unlawful entry in the National Park contrary to sections 21 (1) (a), (b), (2) and 29 (1) of the Tanzania National Parks Act, Cap. 282 R.E 2002 is a non-economic offence.

Ordinarily, all economic offences under the EOCCA are triable by the High Court. Nonetheless, the D.P.P or any State Attorney duly authorized by him has powers to transfer, by certificate, the trial of any economic offences on a court subordinate to the High Court. If the trial involves pure economic offence the transfer has to be done under section 12 (3) of the EOCCA but if the trial is of a combination of both economic and non-economic offences such a transfer has to be done in terms of section 12 (4) of the EOCCA which provides as hereunder:-

> *(4) The Director of Public Prosecution 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 a 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 a non- economic offence,*** *be instituted in the Court."*
>
> (Emphasis is added)

In the case of **Hashimu Athumani and Another v. The Republic,** Criminal Appeal No. 260 of 2017 (unreported) where we were faced with a similar circumstance, we stated:

> *"What can be gathered...is that, the certificate of transfer was issued under section 12 (3) of the EOCCA which confers jurisdiction to the subordinate court to try an economic offence. The non-economic offence was not included in the offences transferred to be tried in the subordinate court. Much as it was not included in the certificate of transfer, it was not proper to issue a certificate under section 12 (3) of the EOCCA in a situation where there was a combination of an economic and non-economic offence. Indeed, the proper provision under the situation was section 12 (4) of the EOCCA which confers jurisdiction to the subordinate court to hear and determine both economic and non-economic offences. In the absence of a valid certificate conferring jurisdiction to the subordinate court under section 12 (4) of the EOCCA, we are settled in our mind that the Resident Magistrate's Court of Tanga did not have jurisdiction to hear and determine both*

economic and non-economic offences against the appellants. Hence, this anomaly renders the entire proceedings a nullity".

Similarly, the certificate in this appeal which was issued under section 12 (3) of the EOCCA did not confer jurisdiction on the District Court of Lushoto at Lushoto to hear and determine a case involving both economic and non-economic offences against the appellant. In that regard, we are in full agreement with the learned State Attorney that the entire proceedings of the trial court and first appellate court are a nullity.

In the event, we invoke the Court's revisional powers under section 4 (2) of the AJA and nullify all the proceedings in the two courts below, quash the conviction and set aside the sentences and orders made therein.

As to whether the appellant be subjected to re-trial or not, we are of the firmed view, as it was submitted by Mr. Magumbo, the circumstances of this case force us not to order a retrial.

We could have ended here but we think we should say something concerning the suggestion made by Mr. Magumbo that the

D.P.P has powers to re-arrest and re-charge a person who has been acquitted by the court even where there is no order of re-trial. We were somehow perplexed by such a comment because once a person is acquitted by the court with no order of re-trial such person cannot be re-arrested and re-charged. Of course, a person who has been re-arrested and re-charged after his acquittal has a right to raise a plea of autrefois acquit.

Admittedly, we are alive to the position we took in the case of **Emmanuel Rutta v. The Republic** (supra) cited to us by Mr. Magumbo that we ordered for release of the appellant and left the fate of the appellant to be at the hands of the D.P.P. It be noted here that the facts and findings in that case are distinguishable with the matter at hand. In that case, the Court did not determine as to whether the re-trial was viable option or not. More so, it did not declare, like in the present case, that re-trial was not a just cause to take. Therefore, each case has to be determined according to its own facts and circumstances.

All said, we order for the immediate release of the appellant, **Ally s/o Salim @ Nyuku**, from custody unless otherwise held for other lawful reasons.

DATED at **TANGA** this 22nd day of September, 2020.

S. A. LILA
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

The Judgment delivered this 23rd day of September, 2020 in the presence of the appellant in person via Video link and Ms. Donata Kazungu State Attorney for the respondent is hereby certified as a true copy of the original.

G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL