

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MWARIJA, J.A., KOROSSO, J.A., And SEHEL, J.A.)

CRIMINAL APPEAL NO. 183 OF 2018

- 1. ABEL ADRIANO1ST APPELLANT**
2. ANAEL MKINDI..... 2ND APPELLANT
3. ERICK WILLIAM KYARUZI3RD APPELLANT

VERSUS

THE REPUBLICRESPONDENT

**(Appeal from the decision of the High Court of Tanzania Dar es Salaam
District Registry at Dar es Saaam)**

(Mlyambina, J.)

Dated the 29th day of June, 2018

in

Criminal Appeal No. 184 of 2017

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JUDGMENT OF THE COURT

15th July & 16th November, 2020

KOROSSO, J.A.:

In the District Court of Morogoro at Morogoro, Abel Adriano; Anael Mkindi and Erick William Kyaruzi, the 1st, 2nd and 3rd appellants respectively, were arraigned together with five other persons who are not subject of this appeal and charged on two counts. On the first count, they were charged with Leading organized crime contrary to paragraph 4(1)(a) of the First Schedule to and sections 57(1) and 60(2) of the Economic and Organized Crime Control Act, Cap 200 Revised Edition 2002 (the EOCCA). The charges in the second count were Unlawful possession of government trophy contrary to section 86(1) and (2)(ii) and 3(b) of the Wildlife

Conservation Act, No. 5 of 2009 (the WCA) read together with Paragraph 14(d) of the First Schedule to and sections 57(1) and 60(2) of the EOCCA. All the appellants categorically denied the charges.

After a full trial, the appellants were convicted by the trial court on the second count only, and were each sentenced to fifteen (15) years imprisonment. The trial court issued orders directing that Tshs. 22,836,800/- paid by one of the acquitted accused persons (the 5th accused) be returned to him together with the firearm, two weight balances, 6 rounds, 2 covers of the rounds and three heads of the rounds of ammunition. The NMB ATM card bank was to be handed to the acquitted 7th accused and 51 pieces of the elephant tusks were to be handed over to TANAPA. A vehicle registered No. T949 ATZ in the mirror with plate number DFP 3438 and two weighing scales were to be forfeited by the Government.

Aggrieved by the conviction and sentence imposed against them by the trial court, the three appellants appealed unsuccessful and the High Court sitting at Dar es Salaam upheld the conviction and sentence against the appellants being satisfied that there was ample evidence against them. Undeterred, the appellants have preferred an appeal to this Court hence the current appeal.

The facts that led to the arraignment of the appellants as gathered from the prosecution evidence are that on the 8th February, 2012 at Masayo, Mikese in Morogoro Region, Inspector Sunday P. Ibrahim (PW1), a traffic police officer and his four colleagues while on patrol stopped a vehicle, Land cruiser VX DFP T. 3468 which was being driven at high speed, that is, over 72 km per hour in an area marked for 50 km per hour. That the said vehicle which had a driver and two passengers (the three appellants) also had another plate number Reg. No. T.949. That they proceeded to interrogate the driver (the 3rd appellant) and the passengers therein.

It is also on record that when interrogation of the three appellants was ongoing and PW1 was holding a cellphone belonging to the 2nd appellant, he heard a voice from the other side of the said cellphone projecting that: "*Hebu malizaneni haraka msijaze nzi hapo watabaini mzigo uliopo hapo*" which unofficially translated means: "*Finish the discussions quickly to avoid a hoard of flies there and discovery of the baggage in there*", the said words raised suspicions. Thus, PW1 replied "*wamekataa*" meaning "*they have refused*" and the voice from the cell phone told them to do all the needful to leave the place. That it was then that the 3rd appellant requested assistance and told them they had elephant tusks in the vehicle and that they were traveling from Mbeya to Dar es Salaam. The

baggage containing the elephant tusks was found in the back of the vehicle. Thereafter, PW1 and colleagues took the appellants off the seized vehicle and into a police vehicle and called the Anti Robbery Task Force to assist. The appellants and the vehicle were then taken to the central police station. At the central police station the seized vehicle was searched by Insp David Kamugisha (PW2) in the presence of the appellants and witnessed by two other persons that is, Mathew Wenga (PW3) and one Astrelia.

In the said search, 51 pieces of ivory tusks, two plate numbers and one digital weighing scale were retrieved and a certificate of seizure was prepared. On the 9th February, 2012 the elephant tusks were analyzed and valued by Jantas Juma (PW6), a Wildlife officer and found to be elephant tusks worth US \$ 3400.0 equivalent to Tshs. 53,720,000.00.

In their defence, all the appellants denied the charges. The 1st appellant who was DWI testified that he is a mechanic, and on the 7th February 2012 went to Mikumi to work on a defective vehicle upon being called to assist and he slept at Mikumi. He alleged that the next day they traveled back with the vehicle to Morogoro and when they reached Mikese they were stopped by traffic police officers, taken off the car and arrested. He denied seeing or having any knowledge of elephant tusks in the vehicle.

The 2nd appellant who was DW2 stated that on 8/2/2012 at Msamvu through an auctioneer (a *dalali*), he managed to get transport in a private vehicle and when they reached Mikese the said vehicle was stopped and he was arrested. He denied any knowledge of the elephant tusks said to have been seized from the vehicle.

The 3rd appellant (DW3) testified that he was the driver of the seized vehicle but he was only driving some passengers. He conceded to the fact that the vehicle he was driving was stopped and seized by the police officers at Mikese, and he was arrested. He denied any knowledge of having elephant tusks found in the vehicle.

After the conclusion of the trial, the trial court convicted the appellants as charged and sentenced them accordingly as expounded hereinabove.

On the day of hearing of this appeal, Abel Adriano (1st appellant), Anael Mkindi (2nd appellant) and Erick William Kyaruzi (3rd appellant) being unrepresented, each appeared in person linked via video conferencing facility from Ukonga Prison, whereas on the part of the Respondent Republic, they enjoyed the services of Ms. Elizabeth Mkunde and Mr. Elia Athanas, both learned State Attorneys.

At the commencement of the hearing, we drew the attention of the parties on a point of law and invited them to address us on the same, that is, whether the trial court had jurisdiction to conduct the trial in light of the Certificate issued by the Director of Public Prosecutions (the DPP) conferring Jurisdiction on the Resident Magistrate's Court of Morogoro at Morogoro while the court that conducted the trial and convicted the appellants was the District Court of Morogoro at Morogoro.

Ms. Mkunde conceded to the fact that the certificate conferring jurisdiction for the trial of the case against the appellant was defective since it conferred jurisdiction on the Resident Magistrate Court of Morogoro and not the District Court which conducted the trial against the appellants and stated that this was erroneous since in light of the said situation it meant there was no valid certificate issued that conferred jurisdiction on the trial court to try the appellants on the charges they faced. She contended that this anomaly meant that the trial of the appellants was a nullity and that the remedy available is for the Court to invoke revisional jurisdiction under section 4(2) of the Appellate Jurisdiction Act [Cap. 141 R.E. 2019] (the AJA) so that the trial be conducted in a court with the requisite jurisdiction.

The learned State Attorney contended that this will be the most plausible solution since the evidence against the appellants was overwhelming and that's why the three appellants were convicted and sentenced. She urged the Court to nullify the proceedings and refer back to the court which was conferred with jurisdiction to try the matter as provided in the certificate by the DPP.

On the part of the 1st appellant, he stated that proceeding in line with the proposed route by the learned State Attorney will enable the prosecution to fill in gaps and prayed for the hearing of the appeal to proceed and the Court determining the appeal as per the grounds of appeal filed. The 2nd appellant argued that the charge sheet states that it is before the Resident Magistrate's Court and since it is a Resident Magistrate who tried their case and convicted them therefore it should be assumed that they were tried in a Resident Magistrate's Court and not a District Court. He contended that there is no need to nullify the proceedings and even if there was an error it was not fatal and urged us to hear the appeal on merit. On the part of the 3rd appellant, he stated that it was the learned State Attorneys for the Republic who were negligent and failed to undertake their responsibilities properly and thus this should not affect the appellants rights or interests in the matter.

With regard to the issue of the Republic being negligent, Ms. Mkunde's rejoinder was that the only anomaly was the fact that the court which tried the appellant's charges was not vested with jurisdiction to conduct the trial, that otherwise the evidence submitted by the prosecution was very strong against the appellants and reiterated the prayers submitted earlier on.

In order to appreciate the nature of the issue we raised *suo motu* on whether or not the trial court had jurisdiction to try the appellants with the offence charged, we proceed to reproduce the charge sheet and the certificate by the DPP conferring jurisdiction on the Resident Magistrate's court to try the matter found at pages 5, 6, 7 and 10 of the record of appeal. They read as follows:

"IN THE RESIDENT MAGISTRATES COURT OF

MOROGORO REGION

AT MOROGORO

(Economic Crimes Jurisdiction)

ECONOMIC CRIME CASE NO OF 2012

REPUBLIC

Versus

1. ABEL ADRIAN

2. ANAEL MKINDI

3. ERICK WILLIAM KYARUZI

4. ESTER HUSSEIN KISAKA @MKINDI

5. EDWIN JOSEPH LIKASI @WAZIRI @MTEI
6. SAID HASSAN KANGOMA
7. HAJI JANUARI MATIKILA
8. MSHAMU SADIK @MSHAMU KAWANGA

CHARGE

1ST COUNT

STATEMENT OF OFFENCE

LEADING ORGANIZED CRIME Contrary to paragraph 4(1)(a) of the First Schedule to, read together with sections 57(1) and 60(2) of the Economic and Organized Crime Control Act [Cap. 200 R.E. 2002]

PARTICULARS OF OFFENCE

ABEL ADRIAN, ANAEL MKINDI, ERICK WILIAM KYARUZI, ESTER HUSSEIN KISAKA @ MKINDI, EDWIN JOSEPH LIKASI @WAZIRI @MTEI, SAID HASSAN KANGOMA, HAJI JANUARI MATIKILA and MSHAMU SADIK @MSHAMU KAWANGA on various dates between 1st February 2012 and 8th February, 2012 at various places within Dar es Salaam, Morogoro and Mbeya Regions jointly and together, willfully organized, supervised and financed a criminal racket by unlawfully dealing in government trophies.

2nd COUNT FOR 1ST, 2ND & 3RD ACCUSED

STATEMENT OF OFFENCE

UNLAWFUL POSSESSION OF GOVERNMENT TROPHIES

Contrary in section 86(1)(2)(c)(ii) and (3)(b) of the Wildlife Conservation Act No. 5 of 2009 read together with Paragraph

14(d) of the First Schedule to, and section 57(1) of Economic and Organized Crime Control Act [Cap 200 R.E. 2002]

PARTICULARS OF OFFENCE

ABEL ADRIAN, ANAEL MKINDI and ERICK WILIAM KYARUZI on or about the 8th February, 2012, at Maseyu area within Morogoro Region Morogoro were found in possession of 51 pieces of Elephant Tusks, valued at Tanzanian Shillings Fifty Three Million Seven Hundred Twenty Thousand (Tshs. 53,720,000/=) only, the property of the United Republic of Tanzania, without a permit from the Director of Wildlife.

DATED at DAR ES SALAAM this 1st day of April,
2016.

Signed

STATE ATTORNEY

**CERTIFICATE CONFERRING JURISDICTION ON A
SUBORDINATE COURT TO TRY AN ECONOMIC CRIME CASE
I, BISWALO EUTROPIUS KACHELE MGANGA, Director of
Public Prosecutions, in terms of Section 12(3) of the Economic and
Organized Crime Control Act [Cap 200 R.E 2002] DO HEREBY
ORDER that ABEL ADRIAN, ANAEL MKINDI, ERICK
WILLIAM KYARUZI, ESTER HUSSEIN KISAKA @MKINDI,
EDWIN JOSEPH LIKASI @WAZIRI KYARUZI, ESTER
HUSSEIN KISAKA @MKINDI, EDWIN JOSEPH LIKASI
@WAZIRI @MTEI, SAID HASSAN KANGOMA, HAJI
JANUARI MTIKILA and MSHAMU SADIK @MSHAMU**

KAWANGA who are jointly and together charged for contravening the provisions of section 86(1)(2)(c)(ii) of the Wildlife Conservation Act, No. 5 of 2009 read together with paragraphs 4(1)(a) and 14(d) of the First Schedule to, and sections 57(1) and 60(2) of the Economic and Organized Crimes Court **BE TRIED** in the Resident Magistrate's Court of Morogoro Region at Morogoro.

Signed at Dar es Salaam this 1st day of April, 2016

Signed

Biswalo Eutropius Kachele Mganga

DIRECTOR OF PUBLIC PROSECUTIONS'

In the said charge sheet and certificate, the names of all the three appellants are clearly visible and can also be seen in the consent issued by the Director of Public Prosecutions for the appellants for their prosecutions for contravening the provisions of which we find no need to reproduce here (found at page 9 of the record of appeal). The certificate conferring jurisdiction on the Resident Magistrate's Court of Morogoro Region at Morogoro to try charges related to economic crimes against the appellants was in line with the provisions of section 12(3) of the EOCCA, which is the proper section where the charges against accused persons are all economic offences which is the situation in the case subject to the current appeal. This fact is also not challenged by the appellants, who conceded to the contents of the charge sheet, consent of the DPP and certificate by the DPP conferring jurisdiction of a subordinate court to try economic offences.

The contentious issue subject to scrutiny relates to the fact that despite the fact that the certificate filed by the DPP conferring jurisdiction to the Resident Magistrate Court of Morogoro to try the case in line with the charges filed in the same court, the trial was conducted by the District Court of Morogoro. This is evidenced from the trial proceedings (at pages 27-156 of the record of proceedings), the judgment of the trial court (at pages 201-225 of the record of appeal), the notice of appeal (at page 226 of the record of appeal) and the petition of appeal (at pages 227-231 of the record of appeal). All these clearly show that the trial court was the District Court of Morogoro at Morogoro and not the Court of Resident Magistrate of Morogoro Region.

We now have to determine whether the District Court of Morogoro had the requisite jurisdiction to try the case subject of the current appeal, which related to economic offences without being conferred with the requisite jurisdiction by virtue of section 12(3) of the EOCCA which states:

"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'.

The above provision mandates subordinate courts to try economic offences upon a certification by the DPP for that purpose.

As rightly pointed out by the learned State Attorney, the absence of a certification from the DPP conferring jurisdiction to the District Court of Morogoro to try the case subject to the current appeal means that it did not have the requisite jurisdiction to try the economic offence charges against the appellant, since the said jurisdiction was conferred on the Resident Magistrate's Court of Morogoro. A subordinate court cannot assume jurisdiction to try an economic offence where it has not been conferred with the same under section 12(3) of the EOCCA. There are various decisions expounding this stance although in most case addressing the essence of the certificate under section 12(3) and 12(4) of the EOCCA but the importance of having a certificate that properly vests jurisdiction of a subordinate court to try an economic offence was emphasized. (See **Hashimu Athumani and Anor vs Republic**, Criminal Appeal No. 260 of 2017 (unreported)) In **Nico Mhando and Two Others vs Republic**, Criminal Appeal No. 332 of 2008 (unreported) it was stated that:

"In the circumstances, the consent of the DPP to prosecute together with a certificate of transfer to

the District Court were mandatorily required. Otherwise, in the absence of such consent and certificate, the District Court lacked jurisdiction and hence the entire proceedings were a nullity".

We are thus satisfied that the District Court of Morogoro (the trial court) lacked the jurisdiction to try the economic offences against the appellants. The arguments by the appellants that since the trial magistrate was a Resident Magistrate and thus the conferred jurisdiction should be inferred to them lacks substance, since jurisdiction is conferred upon a court trying the case and not to the person hearing and determining the case. For the foregoing reason, we thus find that the lack of a proper certificate of transfer to the District court in the present case is an anomaly that renders the proceedings, judgment and orders of the trial court and the High Court a nullity.

On the way forward, we have also considered the arguments by the appellants who while conceding to the discerned procedural anomaly argued that they should not be sanctioned since it was not occasioned by any negligence on their part. At the same time, having considered the nature of the evidence, we respectively agree with the learned State Attorney that the appellants were not properly tried under the circumstances.

Thus, exercising our powers as bestowed under section 4(2) of the AJA, we hereby quash the proceedings and judgment of the trial court and the High Court on the first appeal. We set aside both the sentences and orders imposed on the appellants by the trial court. Under the circumstances, we find it proper to order that the appellants be tried in a Court which was conferred with jurisdiction to try the case, that is, the Resident Magistrate's Court of Morogoro at Morogoro. The appellants to remain in custody while awaiting their trial. We further order that all efforts be made to expedite the retrial.

DATED at **DAR ES SALAAM** this 12th day of November, 2020.

A. G. MWARIJA
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

The judgment delivered this 16th day of November, 2020 in the presence of the appellants appeared in person through video conferencing linked to the Court from Ukonga Prison and Ms. Elizabeth Mkunde, learned State Attorney for the respondent/Republic is hereby certified as a true copy of the original.



S. J. Kainda
S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL