IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: LILA, J.A, WAMBALI, J.A And KOROSSO, J.A.)

Criminal Appeal No. 324 Of 2017

SAIDI LYANGUBI ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Dar es Salaam)

(Kitusi, J.)

dated the 18th day of July, 2017.
In
Criminal Appeal No. 298 No. 2016

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JUDGMENT OF THE COURT

19th February, & 16th March, 2020

LILA, J.A

The appellant, Said Lyangubi, was jointly charged before the District Court of Ulanga at Mahenge with one Evarist Moshi then aged sixteen years, with two counts. In the first count they were charged with the offence of unlawful possession of Government Trophies contrary to section 86 (1) (2) (c) (ii), (3) of the Wild Life Conservation Act No. 5 of 2009, Cap.

283 of the Revised Edition 2002 (the WLCA) as read together with paragraph 14 (d) of the first schedule to and section 57 (1) and 60 (2) of the Economic and Organized Crime Control Act, Cap 200 R. E 2002 (the Act). In the second count, they were charged with the offence of unlawful entry into a game reserve contrary to section 15(1) and (2) of the WLCA. They were convicted as charged and the appellant was sentenced to serve twenty years jail term for the first count and pay TZS 100,000/= fine for the second count. On the other hand, Evarist Moshi was sentenced to suffer six strokes of the cane for each of the counts. Only the appellant was aggrieved and his appeal to the High Court was dismissed. Undaunted, he preferred this appeal to the Court.

At the hearing of the appeal before us, the appellant entered appearance in person and was unrepresented whereas Mr. Nassoro Katuga and Ms Lucy Uiso, both learned Senior State Attorneys and Ms Elizabeth Mkunde, learned State Attorney teamed up to represent the respondent Republic.

At the very outset and before we considered the grounds of appeal, Mr. Katuga intimated to the Court that he was supporting the appeal on

the basis of a point of law which, in terms of Rule 4(2) of the Tanzania Court of Appeal Rules, 2009 (the Rules), he sought leave of the Court to raise for the attention of the Court. He said the legal point touched on the propriety of the proceedings before both courts below. We permitted him to do so.

Elaborating on the point, Mr. Katuga referred us to page 1 of the record of appeal where the charge laid at the door of the appellant is located. According to him, the appellant was arraigned to answer a charge comprised of both economic and non-economic offences. That, while the first count of being found in possession of government trophies is an economic offence the second count of unlawful entry into the game reserve is not an economic offence. In that accord, he argued, a certificate conferring jurisdiction to the subordinate court to try the case found at page 8 of the record of appeal was wrongly issued by the State Attorney under section 12(3) of the Act which caters for economic offences only. He insisted that the appropriate section under which the certificate ought to have been made was section 12(4) of the Act which caters for both economic and non-economic offences. He submitted that since the

certificate did not cover non-economic offence the trial Ulanga District Court before which the appellant was arraigned lacked the requisite jurisdiction to try the case. Concerning the consequences that must befall on the proceedings before both courts below he referred us to our decision in the case of **Kaunguza Machemba vs. The Republic**, Criminal Appeal No.1578 of 2013 (unreported) where the Court declared the trial a nullity for lack of jurisdiction on the part of the trial District Court and naturally the first appellate court.

On the way forward, Mr. Katuga could not mince words. He was of the view that the proceedings and judgments of both courts below were a nullity. He was, however, hesitant to press for an order for re-trial on account of both procedural irregularities in the conduct of the trial apparent on the face of the record and the weakness of the prosecution case which may be rectified by the prosecution if an order of retrial is made. To augment his view, he referred us to the principles set out in the decision of the erstwhile Court of Appeal of East Africa in the case of **Fatehali Manji Vs R**, [1966] EA 343. He pointed out two procedural irregularities committed during the trial. **First**; the appellant was not involved in the

process of securing the disposal order by the magistrate and preparation of the inventory so that his comments could be taken as was stated by the court in the case of **Mohamed Juma @ Mpakama vs Republic**, Criminal Appeal No. 385 of 2017 (unreported), **second**; both the inventory and certificate of valuation were not read out to the appellant after they were cleared for admission to enable him understand its contents as was insisted by the Court in the case of **Mohamed Juma @ Mpakama vs Republic** (supra). Those shortfalls, he said, render the two exhibits invalid subject to be expunged from the record of appeal. In respect of implausibility of the prosecution case, the learned Senior State Attorney pointed out two areas. **First**; the wildlife officer who allegedly identified the meat to be of an elephant (PW2 Ombeni Hingi) did not sufficiently explain his expertise and experience in wildlife meat and did not expressly and specifically tell the trial court how he was able to identify the meat to be that of an elephant in terms of its characteristic features. The resultant effect of that, he said, it could not, with certainty, be ruled that the meat was of an elephant. **Secondly**, he said, there was no clear and cogent evidence that the appellant was arrested while in the game reserve which evidence was very crucial in establishing the offence of unlawful entry into the game reserve.

He was of the view that those deficiencies were critical in the prosecution case able to cause it to collapse. In sum, he refrained from pressing for an order of re-trial.

Finally, Mr. Katuga urged the Court to invoke its powers of revision bestowed on the Court under section 4(2) of the Appellate Jurisdiction Act, Cap.141 of the Revised Edition, 2002 (the AJA) to nullify the proceedings of both the trial and first appellate court, quash the conviction, set aside the sentence and set the appellant free.

For his part, the appellant had nothing to contribute on the legal issue raised by the learned Senior State Attorney but he agreed with him and urged that on account of the shortfalls, his appeal be allowed and he be set at liberty.

In order to appreciate the nature of Mr. Katuga's contention we find it appropriate to reproduce the substance of the charge levelled against the appellant before the trial court thus: -

"1st COUNT
STATEMENT OF OFFENCE

UNLAWFUL POSSESSION OF GOVERNMENT TROPHIES: *Contrary to Section 86(1), (2)(b) and (3) of the Wildlife Conservation Act, No. 5 of 2009 [Cap. 283] read together with Paragraph 14(d) of the First Schedule to and Section 57(1) and 60(2) of the Economic and Organised Crime Control Act, [Cap. 200 R.E. 2002]*

PARTICULARS OF OFFENCE

SAID LYANGUMBI and EVARIST MASHI, on the 3rd February, 2015 at Mikirigembe area within Selous Game Reserve, Ulanga District in Morogoro Region, were found in possession of Government Trophies to wit, 20kgs of Elephant meat valued Tshs. ***26,970,000/=*** *(Twenty Six Million Nine Hundred and Seventy Thousand) the property of the Government of United Republic of Tanzania without permit or licence.*

2ND COUNT
STATEMENT OF OFFENCE

***UNLAWFUL ENTERING INTO A GAME RESERVE**: Contrary to Section 15(1) and (2) of the Wildlife Conservation Act No. 5 of 2009 [Cap. 283].*

PARTICULARS OF OFFENCE

***SAID LYANGUMBI** and **EVARIST MASHI**, on the 3rd February, 2015 at Mikirigembe area within Selous Game Reserve, Ulanga District in Morogoro Region, did inter into Selous Game Reserve without a permission or outhority.*

***Dated** at Morogoro this 6th day of March 2015*

.....

STATE ATTORNEY "

From the above it hardly needs a binocular observation to note, as was rightly submitted by Mr. Katuga that the charge sheet comprised of both economic and non-economic offences. We wholly subscribe to the reasoning espoused by the learned Senior State Attorney that the certificate conferring jurisdiction to the District Court to adjudicate the case ought to have been made under section 12(4) of the Act and not section

12(3) of the Act. To underscore the point, we find it instructive to recite subsections (3) and (4) of section 12 of the Act as hereunder: -

> *"(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.*
>
> *(4) 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 instituted or to be instituted before a economic offence or both an economic offence and non-economic offence or both an economic offence and a non-economic offence be instituted in the Court."*

On the clear wording of the two provisions of the law, it is eminently clear that the certificate in the instant case which was made under section 12(3) of the Act caters for economic offences only while the charge

comprised also of a non-economic offence. The said certificate was couched thus:-

CERTIFICATE CONFERRING JURISDICTION
IN THE SUBORDINATE
COURT TO TRY AN ECONOMIC CRIME CASE

I, SUNDAY MELKIOR HYERA, *State Attorney Incharge, Morogoro zone in terms of Section 12(3) of the Economic and Organized Crime Control Act, [Cap. 200 R.E. 2002] and Government Notice No. 284 of 2014* ***DO HEREBY ORDER THAT*** *the accused persons, namely* ***SAID LYANGUBI*** *and* ***EVARIST MASHI,*** *who are charged for Contravening the provisions of Section 86(1), (2) (b) and (3) of the Wildlife Conservation Act No. 5 of 2009 [Cap. 283] read together with Paragraph 14 (d) of the First Schedule to and Section 57(1) and 60(2) of the Economic and Organized Crime Control Act, [Cap. 200 R.E. 2002]* ***BE TRIED*** *by the District Court of* ***Ulanga*** *at* ***Mahenge.***

Dated *at Morogoro this 6th day of March 2015*

Sunday M. Hyera

STATE ATTORNEY INCHARGE

There is no 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. As was rightly argued by Mr. Katuga, this is not the first time section 12(3) and 12(4) of the Act is coming under proper scrutiny in this Court. It was a subject of discussion in the cited case of **Kaunguza Machemba vs The Republic** (supra). In that case the appellant was arraigned in court to answer a charge comprising both economic and non-economic offences and the certificate conferring jurisdiction to try the case to the Shinyanga Resident Magistrates Court was issued under section 12(3) of the Act. The trial was declared a nullity by the Court.

On the way forward, we hasten to entirely and respectively agree with Mr. Katuga that this is not a fit case to make an order for retrial. The articulated irregularities and unfolded deficiencies in the prosecution evidence shade doubt that if given opportunity there is likelihood of the prosecution to fill in gaps. Such a trial will therefore not be said to be, with

any degree of certitude, fair. Certainly, the appellant was not involved in the process of disposal of the seized meat, the certificate of valuation and the inventory were not read out and or explained to the appellant after their admission as exhibits. In addition, PW2's expertise and experience in wildlife meat was not disclosed and absence of clear evidence explaining away the doubts whether the appellant was found in the game reserve are matters which cast doubt on the plausibility of the prosecution evidence against the appellant which formed the thrust of the appellant's complaints in grounds 3 and 4 of the supplementary memorandum of appeal. These are crucial matters which if a retrial order is made the gaps will be filled. In accordance with the cited case of **Fatehali Manji vs R** (supra), the circumstances in this case are not in favour of a retrial order. We according agree with the course taken by the learned Senior State Attorney.

For the foregoing reasons, we invoke the powers of revision bestowed upon us under section 4(2) of the AJA and we proceed to quash all the proceedings of the trial court and those of the first appellate court as they originated from nullity proceedings of the trial court. We also set aside the sentences meted by the trial court and sustained by the High

Court. We, ultimately, order the release of the appellant from prison forthwith unless he is detained for another lawful cause.

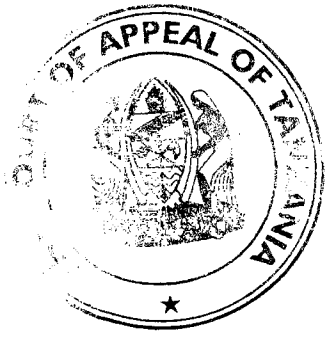
DATED at **DAR ES SALAAM** this 12th day of March, 2020

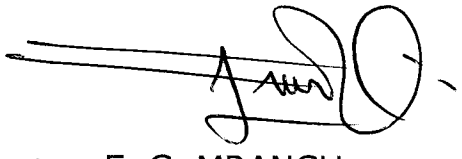
S. A. LILA
JUSTICE OF APPEAL

F.L.K. WAMBALI
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

The Judgment delivered this 16th day of March, 2020 in the presence of the appellant in person and Ms. Cecilia Sheli, learned Senior State Attorney for the respondent, is hereby certified as a true copy of the original.





E. G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL