IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MWARIJA, J.A., LEVIRA, J.A. And KIHWELO, J.A.)

CRIMINAL APPEAL NO. 181 OF 2019

MOHAMED RAMADHANI MAZOLA .....1ST APPELLANT
GEOFREY ALEXANDER MAPUNDA.....2ND APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Munisi, J.)

dated 8th day of May, 2019
in
Criminal Appeal Case No. 298 OF 2018

.....

JUDGMENT OF THE COURT

28th June & 16th November, 2021

MWARIJA, J.A.:

In the Resident Magistrate's Court of Morogoro, the appellants, Mohamed Ramadhani Mazola and Godfrey Alexander Mapunda (the 1st and 2nd appellants respectively) were jointly charged with another person, Method Mathayo Maryango @ Busogo (the appellants' co-accused person) with four counts. In the first count, they were charged with the offence of conspiracy to commit an offence contrary to s. 384 of the Penal Code [Cap.16 R.E 2002, now R. E. 2019]. It was alleged that on divers dates in the year 2009, they conspired to commit the offence of unlawful dealing in trophies.

With regard to the second to fourth counts, the appellants and their co-accused person were charged under the Economic and Organized Crime Control Act-[Cap. 200 R.E. 2002, now R.E. 2019] (the EOCCA). In the second count, they were charged with the offence of being found in unlawful possession of Government trophies contrary to s.86 (1), 2(b) and (3) of the Wildlife Conservation Act [Cap. 283 R.E. 2002] (the Act) read together with paragraph 14(d) of the First Schedule to and ss. 57(1) and 60(2) of the EOCCA. It was alleged that on 26/3/2014 at Mahenge township in Ulanga District within Morogoro Region, they were found in possession of ten (10) elephant tusks weighing 43 kgs, valued at TZS 120,000,000.00., the property of the United Republic of Tanzania without permit or licence.

In the third and fourth counts, they were charged with the offence of unlawful dealing in trophies contrary to s. 84 of the Act read together with the same provisions of the EOCCA as in the second count above. It was alleged that on the same date stated in the second count, at unknown place in Ulanga District within Morogoro Region, they unlawfully dealt in trophies by buying ten elephant tusks valued at TZS 120,000,000.00 from an unknown person. It was alleged further that they also engaged in the same act on divers dates between 2009 and March, 2014 at an unknown places in Dar es Salaam and Morogoro Regions.

Since the second to fourth courts involve economic offences and thus under s. 3 of EOCCA are triable by the High Court (then sitting as the Economic Crimes Court), the appellants and their co-accused person were tried by the said subordinate court after the Director of Public Prosecutions (the DPP) had, through its authorized officer, the State Attorney In-Charge, Morogoro, transferred the case to it under s. 12(3) of the EOCCA.

The appellants and their co-accused person denied all counts and as a result, the case had to proceed to a full trial at which, whereas the prosecution relied on the evidence of 11 witnesses, the appellants and their co-accused person were the only witnesses for the defence.

At the conclusion of the trial, the learned trial Senior Resident Magistrate found that the prosecution had failed to prove the first, third and fourth counts. The appellants and their co-accused person were consequently found not guilty and were thus acquitted. She was however, satisfied that, whereas the second count had been proved beyond reasonable doubt against the appellants, the evidence was insufficient to prove that count against the appellants' co-accused person. He was therefore, found not guilty and acquitted of that count as well. Having been convicted of the second count, the appellants were each sentenced to twenty (20) years imprisonment. Aggrieved by the decision of the trial court, the

appellants appealed to the High Court. Their appeal was however, unsuccessful hence this second appeal.

The background facts giving rise to the appellants' arraignment and their ultimate conviction may be briefly stated as follows: The 1st appellant was until the material time employed by the Government in the President's Office, Public Service Management (Utumishi). He was a driver in the department of retirees, driving motor vehicle registration No. STK 8297 make, Land Cruiser, GX V8. The motor vehicle had another driver (one Gulamali Ally Fazal (PW9). On 26/3/2014, PW9 handed over the motor vehicle to the 1st appellant so that he could take it to the garage. On that date at about 23:45 hrs while on patrol, Assistant Inspector of Police, Geofrey Karugendo (PW1) who was at the material time the Assistant OCS, Mahenge Police Station, received information from a police informer that certain persons were seen at Mwaya Division in Ulanga District loading elephant tusks in a motor vehicle. He was informed that the motor vehicle which was described to him to be of the type used by Regional Commissioners, greyish in colour with tinted glasses, had left Mwaya heading to Ifakara.

On that information, PW1 who was on patrol duty with among others, one Rajabu Twaibu (PW3), a member of the people's militia, communicated

with No. G 274 P/C Joseph, who together with another police officer Samson Augustino Ngolonjela (PW2) were on duty at NMB, Mahenge branch (the NMB) situated along the main road to Dar es Salaam and ordered them to stop the motor vehicle having the description explained to him by the informer. Shortly thereafter, while on the way returning to police station, PW1 saw a motor vehicle of the stated description entering the main road. He ordered his driver, Cpl. Peter to track the suspected motor vehicle. When he arrived at the NMB, he found it already stopped by PW2 and his colleague.

In his evidence, PW1 stated that when he conducted inspection in the motor vehicle which had number plate STK 8394 (not the motor vehicle's real registration number) he found elephant tusks placed on the floorboard of the rear seat. It was his evidence further that the elephant tusks were wrapped in *inter alia*, a mat. He added that the driver of the motor vehicle was the 1st appellant and that, together with him in it was the 2nd appellant. PW1 ordered the 1st appellant to drive the motor vehicle to police station where upon a thorough search, two number plates bearing numbers STK 8297 and T667 BRW were found. He said further that when the elephant tusks were counted, they were found to be ten in number. After the search, PW1 prepared a seizure certificate which was signed by him, the 1st appellant and No. G. 1283 Gudila Peter Mmasi (PW4), the police officer who was on

duty at the CRO. PW1 tendered the search order and the seizure certificate which were admitted in evidence as exhibit P1 collectively. He also tendered the motor vehicle, 10 elephant tusks, two number plates and a mat. The same were admitted in evidence as exhibits P2 – P5 respectively.

The evidence of PW1 was supported by that of PW2, PW3 and PW4. PW3 testified that on the material date, he was on patrol duty with PW1 and later went with him to NMB where they found the motor vehicle (exhibit P2) having been stopped by PW2 and his collegue. It was his evidence further that he witnessed its search at the police station and later on signed exhibit P1 collectively.

On his part, PW4 testfied to the effect that upon the search of the motor vehicle, exhibit P3 – P5 were found in it. He testified further that he also signed exhibit P1 collectively. As for PW2, he stated that following the order of his superior (PW1), he stopped the motor vehicle which was being driven by the 1st appellant and that upon being searched, exhibit P3 was found in it. According to his evidence, after that finding, PW1 ordered the 1st appellant to drive the motor vehicle to police station.

The prosecution adduced further evidence through No. E8293 D/Cpl. Keneth John (PW10) and Cpl. Ezekiel Tumtufye Mwamakusa (PW7). Their evidence was to the effect that, they recorded cautioned statements of the

1st and 2nd appellants respectively. According to the evidence of the two witnesses, the appellants admitted that they were found in unlawful possession of exhibit P3. Their statements were admitted in evidence after inquiry and marked as exhibits P9 and P10 respectively.

It was the prosecution's evidence also that the appellants were taken before the Justice of the Peace who recorded their extrajudicial statements. The evidence to that effect was given by Veronica Michael Selemani (PW6) who was at the material time a Primary Court Magistrate stationed at Vigoi Primary Court. It was her evidence that the appellants volunteered to record their statements in which they confessed to have been found in unlawful possession of exhibit P3. The extrajudicial statements of the 1st and 2nd appellants were admitted in evidence as exhibit P7 and P8 respectively.

Evidence for the prosecution was also tendered by Rajabu Ally Punje (PW8) and Insp. Boni Mbange Mgogo (PW11). In his evidence, PW11 who investigated the case stated that after having carried out investigation, he found out first, that the 1st appellant travelled to Mahenge without authorization from his office and secondly, that the plate number which was affixed on exhibit P2 at the time of its impoundment was the number of another motor vehicle used by the Deputy Director, Utumishi whose driver was PW8. Supporting the evidence of PW11 on that aspect, PW8 testified

that the registration number found on exhibit P2 on the date when it was impounded at Mahenge is the number of the motor vehicle used by his boss, the Deputy Director, Utumishi. He however said in his evidence, that the plate number which was tendered at the trial was fake.

In their defence, the appellants exculpated themselves from the charges. Giving his evidence, the 1st appellant (DW1) stated that on 26/3/2014 at 21:00 hrs when the police arrested him at Mahenge, he was returning from Mahenge Hospital where he had taken his relative for treatment and was going to seek a place to get accommodation. He went on to state that, he had earlier on left Dar es Salaam at 13:00 hrs using the motor vehicle (exhibit P2) to transport his sick relative to Mahenge Hospital. It was his evidence further that, shortly after his arrest by the police officers who were guarding the NMB, a police motor vehicle arrived and was ordered to board it. Having boarded it, he was taken to police station while his motor vehicle was driven there by another person.

It was DW1's further evidence that, at the police station, PW1 removed him from the lockup and took him to a garage where he was tortured by being beaten with a club and piece of wood. Thereafter, he said, he was returned to the lockup at 02:00 hrs and in the morning of 27/3/2014 at 08:00 hrs he was again taken out by PW1 and sent to the same garage where he

was required to sign certain documents. He said that at first, he refused to do so but signed them after PW1 had slapped and threatened that he would be tortured as was done in the previous night. Later on 28/3/2014 he was taken to the Primary Court where he signed other documents before the Justice the Peace. He stated that he signed the documents out of fear because of the prior threats by the police that he would be beaten if he refused to do so.

With regard to his relationship with the 2nd appellant, the 1st appellant stated in his evidence that he saw him for the first time at the police station on the date of the incident. It was his evidence also that, he saw the elephant tusks for the first time when the same were being offloaded from the motor vehicle at the police station. He added that, at the time of his arrest, the motor vehicle was affixed with plate number T667 BRW but at the time when the elephant tusks were being offloaded, he saw it having been affixed with a plate number reading STK 8297.

On his part, the 2nd appellant (DW2) testified to the following effect: On 26/3/3014, he went to Mahenge to see a traditional healer for treatment as he was suffering from "chembe ya moyo" (angina pectoris). While at Mahenge bus terminal, he was approached by a police officer who, after having questioned him, took him to police station on account that he was

being suspected of having committed an offence. At the police station where he met three persons including DW1, he was tortured and on 27/3/2014, the police officer called Kidevu tortured him again in the presence of PW1. He was required to sign certain documents which, because of that torture, he agreed to sign them. On the next day at 11:00 hrs, following PW1's order he was taken to Vigoi Primary Court and required to sign other documents before the Justice of the Peace. He signed the documents because he feared further beatings by the police. Later at about 17:00 hrs, he was taken together with DW1 to Morogoro and on 4/4/2014, they were jointly charged as earlier on stated above.

As intimated earlier, the appellants were found guilty of the second count. In convicting them, the trial court relied on the evidence of PW1, PW2 and PW3 to the effect that, when the motor vehicle was searched at the NMB and at the police station, it was found to have carried exhibit P3. It also acted on the evidence of the 1st and 2nd appellants' cautioned statements (exhibits P10 and P9 respectively) and their extrajudicial statements (exhibits P7 and P8 respectively).

On her part, in upholding the decision of the trial court, the learned first appellate Judge found that the second count was proved beyond reasonable doubt by the evidence of PW1, PW2, PW3 and PW4. According

to the learned Judge, since it was an established fact that the appellants were arrested in the motor vehicle, the evidence of PW1 – PW4 that after its search, it was found to have carried exhibit P3, the conviction of the appellants on that count was properly founded. She was, for that reason, of the view that there was no possibility that exhibit P3 was planted in the motor vehicle. She found further that, the evidence of the appellants' cautioned and extrajudicial statements was properly acted upon by the trial court to found their conviction.

As stated above, the appellants were dissatisfied with the decision of the High Court and thus preferred this appeal. In their joint memorandum of appeal filed on 1/7/2019, they raised eleven grounds of appeal. Later on 8/11/2019 however, they filed four additional grounds and on 10/9/2020, they lodged supplementary memorandum containing two grounds of appeal. We do not intend to consider all grounds of appeal because, as will be apparent herein, the 1st ground of the supplementary memorandum of appeal will suffice to dispose of the appeal. In that ground of appeal, the appellants contend as follows:

> *"That the learned 1st appellate Judge grossly erred in law by upholding the appellant's conviction and sentence in a case*

whereby the certificate did not confer the requisite jurisdiction to the trial court to try the case."

At the hearing of the appeal, the appellants appeared in person, unrepresented. On its part, the respondent Republic was represented by Ms. Cecilia Shelly, learned Senior State Attorney assisted by Ms. Anunciata Leopold, learned Senior State Attorney and Mr. Salim Msemo, learned State Attorney.

When they were called upon to argue their appeal, the appellants informed the Court that they had decided to abandon the grounds filed on 8/11/2019 in the form of additional grounds of appeal. As for the remaining grounds of appeal, they opted to hear first, the respondent's reply thereto reserving their right to make rejoinder submissions, if the need to do so would arise.

In reply to the appellants' grounds of appeal, at first, Ms. Shelly expressed the respondent's stance that it was resisting the appeal. However, upon reflection as regards the point of law raised in the 1st ground of the supplementary memorandum of appeal, the learned Senior State Attorney decided to support the appeal. The gist of that ground of appeal is that, since the charges which were preferred against the appellants involved both economic and non-economic offences, the DPP certificate transferring the

case to the subordinate court ought to have been issued under s. 12(4) not 12(3) of the EOCCA which applies only when the charge involves an economic offence.

Submitting in response to that ground of appeal, Mr. Msemo agreed that, since the certificate transferring the case to the Resident Magistrate's Court of Morogoro was issued under s. 12(3) instead of s. 12(4) of the EOCCA, the same was invalid and therefore, the learned Senior Resident Magistrate acted without jurisdiction. As a result, the learned State Attorney went on to submit, the trial was a nullity. In support of his argument, he cited the Court's decision in the case of **Emmanuel Rutta v. Republic,** Criminal Appeal No. 357 of 2014 (unreported). It was his submission therefore, that ground 1 of the supplementary memorandum of appeal has merit and thus agreed that the appeal may be allowed on that ground.

On the way forward, Mr. Msemo prayed for a retrial contending that the evidence which was tendered by the prosecution is sufficient to warrant grant of an order directing the hearing of the case afresh.

In rejoinder, the appellants welcomed the respondent's concession to the 1st ground of their supplementary memorandum of appeal. On the way forward however, the first appellant opposed the learned State Attorney's prayer for a retrial order contending that the evidence which was relied upon

by the prosecution at the trial is insufficient and that therefore, in case a retrial is ordered, the prosecution will be afforded the opportunity to fill up gaps in its evidence. The second appellant supported the submission made by the first appellant and prayed to the Court to allow the appeal and release them from prison.

Having considered the submissions of the parties, we agree that the certificate of the DPP transferring the case for hearing by the Resident Magistrate's Court of Morogoro was invalid because it did not vest the trial court with jurisdiction to try economic offences in conjunction with the non-economic offence preferred in the first count. The certificate which was issued under section 12(3) of the EOCCA states as follows:

> *"12- (1) ....N/A*
>
> *(2) ....N/A*
>
> *(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 a certificate, under his hand, order that any case involving an offence triable by the Court under the Act, be tried by such court subordinate to the High Court as may be specified in the certificate."*

It is clear that, whereas according to the certificate, the transfer was in respect of the economic offences, as shown above, the appellants were also tried of a non-economic offence. It has been held by the Court in a number of its decisions that, where a charge involves economic and non-economic offences, a certificate transferring the case for hearing by a subordinate court has to be made 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 duly authorized 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 non-economic offence, be institute in the Court."*

The effect of a failure by the DPP to issue a certificate authorizing a trial by a subordinate court, of a combination of economic and non-economic offences has been held to render the trial a nullity. See the cases of

Emmanuel Rutta v. Republic, Criminal Appeal No. 357 of 2014 cited by the learned State Attorney, **Gaitan Susuta v. Republic,** Criminal Appeal No. 403 of 2015, **Mabula Mboje v. Republic,** Criminal Appeal No, 557 of 2016, **William Kilunga v. Republic,** Criminal Appeal 447 of 2017 and the recent decision in that case of **Kalimilo Mahula @ Kutiga v. Republic,** Criminal Appeal No. 565 of 2016 (all unreported) to mention but a few. In the first case, the Court observed that:

> *"Since in this appeal the learned Principal State Attorney in-charge at Mwanza failed to comply with section 12(4) of the Economic and Organized Crime Control Act the District Court of Bukoba lacked jurisdiction to try the appellant."*

Furthermore, in the case of **Gaitan Susuta** (supra) in which, like in the case at hand, the certificate transferring to the District Court, the case involving both economic and non-economic offences was not issued under s. 12(4) of the EOCCA, the Court held as follows:

> *"There is no Certificate issued to transfer the trial of combined Economic and non-economic offences to any subordinate court, not even to the District Court of Iringa. It seems clear to us that if the DPP or his designated officer had intended the District Court to combine the trial of an Economic offence together with Non-Economic Offence, a certificate should have been filed in compliance with sub-section (4) of section 12 of*

Cap. 200. This certificate of Transfer would have seized the District Court of Iringa with requisite jurisdiction to try a combination of economic offences and non-economic offense."

Similarly in the case of **Mabula Mboje** (supra), addressing a similar situation the Court had this to say:

> *"In view of the fact that the certificate by the DPP was made under section 12(3) of the Economic and Organized Crime 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 therefore were a nullity right from the beginning. So were the proceedings in the first appellate court because they were rooted on nullity proceedings."*

Guided by the authorities cited above, we find that the trial court did not have jurisdiction to try the case. In the event, we hereby nullify the proceedings of the trial court, quash the judgment and conviction and set aside the sentence meted out on the appellants. As a consequence the proceedings and the judgment of the High Court are also hereby quashed because, the same stemmed from the trial which was a nullity.

On the way forward, from the evidence which we have endeavoured to outline above, we find that to meet the ends of justice, an order of retrial is appropriate. In the circumstances, we order that the appellants should be tried afresh in accordance with the law.

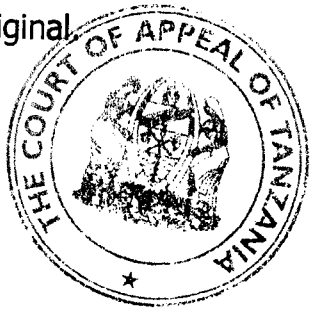
DATED at **DAR ES SALAAM** this 9th day of November, 2021.

A. G. MWARIJA
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

The judgment delivered this 16th day of November, 2021 in the presence of the appellant in person and Ms. Subira Mwalumuli, learned Senior State Attorney for the respondents is hereby certified as a true copy of the original.



G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL