IN THE COURT OF APPEAL OF TANZANIA
AT SHINYANGA

(CORAM: MUGASHA, J.A., KITUSI, J.A And MASHAKA, J.A.)

CRIMINAL APPEAL NO. 445 OF 2017

KINGOLO LIMBU @TINA..... 1ST APPELLANT
KUBE LYONGO @ ZUMBI.....2ND APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Makani, J.)

dated the 8th day of September, 2017
in
Criminal Appeal No. 128 of 2015

RULING OF THE COURT

10th & 13th August, 2021.

MUGASHA, J.A.:

The appellants Kingolo s/o Limbu @Tina, Kube s/o Lyongo @Zumbi and Mkira s/o Toyota @ Dile were jointly and together charged and convicted before the District Court of Bariadi with four counts. On the 1st count they were charged with unlawful entry into the National Parks contrary to section 21 (1) and (2) of the National Parks Act Cap, 282 RE 2002. It was alleged that, on 14/12/2012 at about 10:45 hours at Ngoma Hill area, they entered into the Serengeti National Park within Bariadi District in Shinyanga Region, without any written permit from the Director of the National Parks.

In respect of the second count, they were charged with unlawful possession of weapons in the National Parks contrary to section 24(1) and (2) of the National Parks Act (Cap 282 R.E. 2002) read together with paragraph 14(c) of the First Schedule to the Economic and Organized Crime Control Act, (Cap 200 R.E. 2002) (the EOCCA). In this regard, it was alleged that, on the same date, time and place, the appellants were found in unlawful possession of weapons to wit; one knife, one machete, and two trapping wires into the Serengeti National Park without permit and they failed to satisfy to the authorized officer that the said weapons were intended to be used for the purpose other than hunting, killing, wounding or capturing of animals.

As for the 3rd count, the appellants were charged with unlawful hunting in the National Parks contrary to section 23(1) of the National Parks Act, Cap 282 RE 2002 read together with paragraph 14 (a) of the First Schedule to the EOCCA. It was also alleged by the prosecution that, on the same date and time, the appellants jointly and together were found int the Serengeti National Park hunting animals to wit; ten wildebeests and one Eland without having a permit from the Director of the National Parks.

On the fourth and last count, the charge was unlawful possession of Government Trophies contrary to section 86(1) and (2) and 2(c) (ii) of the

Wildlife Conservation Act No. 5 of 2009 (the WCA) read together with paragraph 14(d) of the First Schedule to EOCCA. It was further alleged that, on the same date and time at Ngoma Hill area in the Serengeti National Parks within Bariadi District, in Shinyanga Region the appellants were found in possession of government trophies to wit; One dried skin, one tail, and eight dried pieces of Eland meat equal to one animal killed valued at 2,677,500/= and fifty pieces of dried meat and ten tails of wildebeest equal to ten killed animals valued at 10,237,500/= properties of the Government of the United Republic of Tanzania.

The appellants were tried and eventually convicted of all the four counts. On the first count, each accused was sentenced to pay a fine of TZS. 10,000/= or in default a jail term of one year; on the second count, each appellant was sentenced to pay a fine of TZS. 20,000/= or in default to two years in jail; on the third count each appellant was sentenced to pay a fine of TZS. 50,000/= or in default to serve a jail term of three years. On the fourth count, they were sentenced to pay a fine of TZS. 15,000,000/= or in default to serve a jail term for twenty years.

The appellants were dissatisfied with both conviction and sentence. They unsuccessfully lodged an appeal before the High Court of Tanzania which was dismissed. Still unamused, they have preferred the present

appeal. However, on account of reasons to be apparent in due course, we shall not reproduce the grounds of appeal. At the hearing the appellants appeared in person, unrepresented whereas the Respondent Republic had the services of Ms. Edith Tuka and Ms. Wampumbulya Shani, both learned State Attorneys.

We invited the parties to address us as to whether or not the trial court had jurisdiction to conduct a trial involving economic and non-economic case and hence the propriety or otherwise of the proceedings before the courts below. On taking the floor, Ms. Shani submitted that the trial court was not clothed with requisite jurisdiction to try the case which is a subject of the present appeal. On this, she pointed out that, the appellants were charged with four counts out of which, the first count was a non-economic offence whereas the remaining three counts were economic offences. She thus contended that, the certificate given by the Director of Public Prosecutions (the DPP) to confer jurisdiction was wrongly predicated under section 12 (3) of the EOCCA instead of section 12 (4) of the EOCCA which mandates the DPP to issue a certificate to confer jurisdiction to the subordinate court to try together both economic and non-economic offences. In the circumstances, she contended that, the certificate was invalid and on that account, the District Court of Bariadi was not vested with jurisdiction to try

the case which is a subject of the appeal and as such, the trial proceedings as well as the proceedings of the appellate court were a nullity. In this regard, the learned State Attorney implored us to nullify the proceedings and judgments of the courts below.

On the way forward, the learned State Attorney was hesitant to pray for a retrial arguing that it was flawed with procedural irregularities which will render a retrial meaningless. On this, she pointed out that apart from the crucial documentary exhibits not being cleared for admission, they were not read out to the appellants and the omission is a fatal irregularity. To cement her arguments, she cited to us the cases of **SAIDI LYANGUBI VS REPUBLIC,** Criminal Appeal No. 324 of 2017 (unreported) and **ROBINSON MWANJISI VS REPUBLIC [2003] TLR 218.**

Given the above situation, the learned State Attorney urged the Court to set the appellants at liberty. On the other hand, the appellants being laypersons had nothing useful to submit apart from praying to be set at liberty.

Having considered the submission of the learned State Attorney and the record before us, the issue for consideration is the propriety or otherwise of the proceedings of the lower courts. Jurisdiction of the Court is a creature of statute and as such, it cannot be assumed. According to the provisions of

section 3 of the EOCCA, it is the High Court which is vested with jurisdiction to try economic offences. The said section provides as follows:

> *"3(1) the jurisdiction to hear and determine cases involving economic offences under this Act is hereby vested in the High Court."*

The economic offences cannot be validly tried by the court without obtaining the consent of the DPP as required under section 26(1) of the EOCCA which states as follows:

> *"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."*

The aforesaid notwithstanding, the subordinate courts are also mandated to try economic offences subject to obtaining the consent of the DPP as per the dictates of section 26(2) of the EOCCA. In addition, a certificate of transfer has to be issued by the DPP specifying that the economic offence triable by the High Court be tried by the respective subordinate court. This is in terms of section 12(3) of the EOCCA which provides as follows: -

"12 (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."

Besides, where a charge involves both economic and non-economic offence which have to be tried together, section 12(4) of the same EOCCA gives the following direction:

"12(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 a non-economic offence/ be instituted in the Court."

In the present case as earlier stated the certificate of the DPP which was issued under section 12(3) the EOCCA is reflected at page 5 of the record of appeal as hereunder: -

"IN THE DISTRICT COURT OF BARIADI DISTRICT

AT BARIADI

ECONOMIC CRIME CASE NO. 54 OF 2012

REPUBLIC

VERSUS

1. KINGOLO S/O LIMBU @ TINA

2. JUBE LYONGO @ ZUMBI

3. MKIRA S/O TOYOTA @ DILE

CERTIFICATE CONFERRING JURISDICTION ON SUBORDINATE COURT TO TRY AN ECONOMIC CASE.

*I, **TIMON VITALIS**, Principal State Attorney In-charge, Shinyanga Zone, do hereby, in terms of Section 12(3) of the Economic and Organized Crimes Control Act, [CAP 200 R.E 2002] and GN No. 191 of 1984 ORDER that The above accused who are/is charged for contravening the provisions of Paragraph 14(c), 14(a) & 14(d) of the First Schedule to the Economic and Organised Crime Control Act [Cap. 200 R.E. 2002] BE TRIED by the District Court of Bariadi at Bariadi.*

Signed at Shinyanga this 17th day of December, 2012.

Sgd.

Timon Vitalis

***PRINCIPAL STATE ATTORNEY IN CHARGE**."*

The above certificate issued under section 12(3) of the EOCCA conferred jurisdiction to the subordinate court to try solely an economic offence and as can be discerned with the non-inclusion of the non-economic offence of unlawful entry into the National Park contrary to section 21 (1) and (2) of the National Parks Act constituting the first count. This was not appropriate because since the appellants were charged with both economic and non-economic offences; it was incumbent on the DPP to issue a certificate under section 12 (4) of the EOCCA so as to confer jurisdiction on the District Court of Bariadi to try both economic and non-economic offences against the appellants. The Court was confronted with akin situation in the case of **EMMANUEL RUTTA VS REPUBLIC,** Criminal Appeal No. 148 of 2011, and it observed that: -

> *"... because the learned Principal State Attorney complied only with s. 26 (1) and 12 (3) and failed to comply with section 12 (4) then the District court of Bukoba lacked jurisdiction to try the appellant with a combination of the offences of unlawful possession of firearms and ammunition under the Economic and Organized Crime Control Act No. 13 of 1984 as amended by Act No. 10 of 1989 and those of the armed robbery under the Penal Code."*

Thus, in the present case in the absence of the certificate under section 12 (4) of the EOCCA, an economic offence could not be prosecuted in conjunction with some non-economic offences in a subordinate court as it lacked the requisite jurisdiction. See – **ABRAHAM ADAMSON MWAMBENE VS REPUBLIC,** Criminal Appeal No. 148 of 2011 and **RHOBI MARWA MGARE AND 2 OTHERS VS REPUBLIC**, Criminal Appeal No. 192 of 2004 (both unreported).

The fate of similar charge tried without the certificate issued by the DPP under section 12 (4) of the EOCCA, was addressed in the case of **ALLY SALUM @ NYUKU VS REPUBLIC**, Criminal Appeal No. 87 of 2020 as this Court made a finding that: -

> *"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 same vein, in the case at hand, without a certificate issued under section 12 (4) of EOCCA, the trial court had no jurisdiction to try the

economic offence in conjunction with the non-economic offence and as such, the purported trial of the appellant was a nullity and so was the appeal before the High Court as it stemmed from null proceedings. On the way forward, ordinarily, the remedy of the said omission would be a retrial. However, given the circumstances of the case, as correctly submitted by the learned State Attorney a retrial is not worthy and we shall demonstrate. The anomalies are at page 15 of the record of appeal, PW3 Jesca Mathias, tendered the inventory form and valuation certificate of the Government trophies (exhibits P2 and P3 respectively). After the admission of exhibits P2 and P3, the same were not read over to the appellants who though present at the trial, were convicted on the basis of the documentary exhibits they were not aware of. The omission renders the exhibits invalid and therefore expungable. - See for example the cases of **SEMENI MGONDA CHIWANZA VS REPUBLIC**, Criminal Appeal No. 49 of 2019 and **EMMANUEL KONDRAD YOSIPATI VS REPUBLIC**, Criminal Appeal No. 296 of 2017 (both unreported) and **ROBINSON MWANJISI AND OTHERS VS REPUBLIC** (*supra*) whereby Court stated the following principle: -

> *"Whenever it is intended to introduce any document in evidence, it should first be cleared for admission and be actually admitted, before it can be read out.*

Reading out document before they are admitted in evidence is wrong and prejudicial."

We have also noted that, PW3 who tendered the inventory form and valuation certificate of the Government trophies (exhibits P2 and P3 respectively) which appears at page 12 of the record of appeal, was not competent to do so, not being among officers authorized to issue a trophy valuation certificate as per the mandatory dictates of sections 86(4) and 114(3) of the WCA, which require the certificate of trophy evaluation to be issued by either the Director of Wildlife or any Wildlife officer who is defined under section 3 of the WCA as:-

"A wildlife officer, a wildlife warden and a wildlife ranger engaged for the purposes of enforcing the Act."

PW3 a game officer does not fall under the scope and purview of wildlife officer and thus, the respective certificate is as good as not issued.

In the circumstances, we agree with Ms. Shani that, on account of blatant shortfalls in the prosecution account a retrial is not worthy as it is likely to prejudice the appellants because the prosecution will get the opportunity of filling in the gaps and that will indeed not serve the interests of justice. See – **FATEHALI MANJI VS REPUBLIC** [1966] 1 EA 343.

In view of what we have endeavoured to discuss, in the exercise of our revisional jurisdiction under section 4 (2) of the Appellate Jurisdiction Act [CAP 141 RE. 2019], we nullify the proceedings and judgments of the courts below, quash and set aside conviction and sentence. In the upshot, we order the immediate release of the appellants unless they are otherwise lawfully held for some other cause.

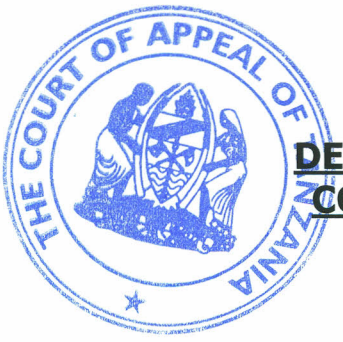
DATED at **SHINYANGA** this 12th day of August, 2021.

S. E. A. MUGASHA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

L. L. MASHAKA
JUSTICE OF APPEAL

This Ruling delivered this 13th day of August, 2021 in the presence of the Appellants in person, unrepresented and Ms. Wampumbulya Shani, learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.



B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL