

**IN THE COURT OF APPEAL OF TANZANIA
AT SHINYANGA**

(CORAM: WAMBALI, J.A., LEVIRA, J.A. And KAIRO, J.A.)

CRIMINAL APPEAL NO. 447 OF 2017

WILLIAM KILUNGA APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

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

(Kibella, J.)

dated the 21st day of September, 2017

in

Criminal Appeal No. 11 of 2017

JUDGMENT OF THE COURT

11th & 24th August, 2021

KAIRO, J.A.:

The appellant and another not a party to this appeal, who was tried in absentia under section 226 of the Criminal Procedure Act, Cap 20 R.E. 2002 (now R.E 2019), were jointly and together charged and convicted of four counts by the District Court of Bariadi. In the first count they were charged with unlawful entry into the National Park contrary to sections 21 (1) (2) and 29 of the National Parks Act, Cap.282 R.E. 2002 as amended by Act No. 11 of 2003 of the National Parks Act read together with GN No. 235 of 1968. It was alleged that on 24th day of February, 2016 at about 13.05 hrs at Milima ya Nyaruboro area in Serengeti National Park within Bariadi District in Simiyu Region, the duo

entered into the Serengeti National Park without permission from the Director of the National Parks previously sought and obtained.

On the second count they were charged with unlawful possession of weapons into the National Park contrary to section 24 (1) (b) and (2) of the National Parks Act read together with G.N. No. 235 of 1968 and paragraph 14 (c) of the 1st schedule to the Economic and Organized Crimes Control Act, Cap 200 R.E. 2002, (the EOCCA) and section 57 (1) and 60 (2) of the same Act. It was further alleged that, on the same date, time and place, they were found in unlawful possession of weapons to wit; spear, ten arrows, two pangas and five animal trapping wires without permission from the Director of the National Parks previously sought and obtained.

As for the third and fourth counts, the duo were charged with unlawful possessions of Government Trophies contrary to section 86 (1), (2) (c) (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 section 57 (1) of the EOCCA. In this regard, it was alleged that on the same date, time and place, the two were found in possession of Government Trophies to wit; nine pieces of skin, twenty pieces of dried meat of Impala valued at USD 3510 equivalent to TZS. 7,660,575/=,

one dried skin and eight pieces of dried meat of Topi valued at USD.800 equivalent to TZS. 1,746,000/= without permission from the Director of National Parks previously sought and obtained. The allegations were strongly denied by the duo, hence a full trial was held. The prosecution side summoned four witnesses and tendered three exhibits which were one skin of Topi, nine skin of Impala, five trapping wires, two knives, two machetes, ten arrows which were collectively admitted as exhibit P1. Further to that; Trophy evaluation form and Inventory form were admitted as exhibit P2, and P3 respectively, to support its case. As alluded to above, the appellant defended himself and the other person did not enter defence.

Nonetheless, after a full trial, the appellant and his fellow were convicted of all the four counts. For the first count, they were sentenced to pay a fine of TZS. 10,000/= or in default to serve two months in prison each, for the second count, each one of them was sentenced to pay a fine of TZS. 20,000/= or in default to serve two months imprisonment, as for the third count, they were each sentenced to pay a fine of TZS. 76,605,750/= or in default to serve twenty years imprisonment. As for the fourth count they were each sentenced to pay

a fine of TZS. 17,460,000/= or in default to serve twenty years imprisonment.

Dissatisfied with the decision of the trial court, the appellant appealed to the High Court at Shinyanga where Kibella J. dismissed his appeal in its entirety on 21st day of September, 2017. Undaunted, he lodged the present appeal raising five grounds of appeal. However, for the reasons to be apparent shortly, we refrain from reproducing them herein.

At the hearing, the appellant appeared in person, unrepresented while Messrs Jukael Reuben Jairo and Nestory Mwenda, both learned State Attorneys represented the respondent Republic.

At the very outset before considering the grounds of appeal, Mr. Jairo intimated to the Court that he prays to submit on a point of law and sought leave of the Court to raise it under Rule 4 (2) of the Tanzania Court of Appeal Rules, 2009 (the Rules). We granted the leave sought as the appellant had no objection.

Mr. Jairo pointed out that the appellant was charged with four counts which comprised of economic and non-economic offences. He amplified that the first count concerns non-economic offence while the

rest of the counts are economic offences. He went on to submit that legally the mandate to try economic offences lies with the High Court. However, the lower courts' mandate to hear and determine economic offences is subject to the certificate conferring jurisdiction on them and consent by the Director of Public Prosecution (the DPP) or a person given the said powers by the DPP. Mr. Jairo further submitted that in the case at hand, the DPP issued a certificate in which he conferred the power to try and determine the charged offences under section 12 (3) of the EOCCA which he argued to be improper as the provision allows the subordinate courts to try and determine economic offences only. Mr. Jairo charged that since the offences in the charge sheet are a combination of economic and non-economic offences, the proper provision in which the certificate ought to be issued is section 12(4) of the EOCCA.

He contended that, the certificate issued under section 12(3) of the EOCCA did not confer jurisdiction and rendered the proceedings at the trial court and the decision thereon null and void as reiterated in several decisions of the Court. Mr. Jairo concluded that the only remedy available is to nullify the proceedings of both the trial and first appellate courts, quash conviction and set aside the sentence imposed on the

appellant in terms of section 4(2) of the Appellate Jurisdiction Act, R.E. 2019 (the AJA). He cited the cases of **Mabula and 2 Others v. Republic**, Criminal Appeal No.557 of 2016 pages 8-12, **Saidi Lyangubi v. Republic**; Criminal Appeal No.324 of 2017 pages 8 -11 and **Emmanuel Rutta v. Republic**, Criminal Appeal No.357 of 2014 (all unreported) to back up his argument. On the way forward, he submitted that although retrial is a proper remedy but, in the circumstance of the case at hand, it is not worthy as it will not be in the interest of justice. He explained that this is because the trial was flawed with procedural irregularities such as:- **One**; exhibit P1 was tendered and admitted despite the objection from the appellant; **Two**; the boundary between the park and where the accused was apprehended was not clearly explained. **Three**; the contents of exhibits P2 and P3 were neither explained by PW4 who tendered them, nor were they read after being admitted and **five**; PW4 did not explain the expertise and experience he had in wildlife meat as was observed in **Saidi Lyangubi (supra)**. He contended further that in the circumstances, a retrial order would enable the prosecution to fill in the gaps and thus occasioning injustice to the appellant referring us to the principles set out in the decision of the defunct Court of Appeal of East Africa in **Fatehali Manji v. Republic**

[1966] E.A 343. Ultimately, he prayed the Court to set free the appellant.

When we called upon Mr. Jairo to comment on the listed offences as per the certificate granted vis a vis the charge sheet, he was quick to respond that the offences in the certificate do not tally with those listed in the charge sheet. He elaborated that the certificate has listed the offence of unlawful hunting in the National Park, but the appellant was never charged with such an offence as per the charge sheet. He added another irregularity that the trophies were disposed prior to the commencement of the trial, but later during the hearing, the trophies seemed to have resurfaced and were tendered and admitted with other items as exhibit P1. He insisted his prayer to us to set free the appellant for the interest of justice.

When invited to reply, the appellant had nothing much to say being a lay person and unrepresented. He requested us to adopt and consider his grounds in the memorandum of appeal, allow the appeal and acquit him of the offences charged.

From the submission by Mr. Jairo and the record before us, the issue for our determination is whether the consent and certificate issued

by the State Attorney In charge did confer jurisdiction to the District Court of Bariadi to try both economic and non-economic offences.

Essentially, it is noted that the jurisdiction to try economic offences lies with the High Court as per section 3 of the EOCCA which provides: -

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

The law further requires the DPP to give his consent before the court can validly try an economic offence as per section 26 (1) of the EOCCA. However, the subordinate courts are also mandated to try economic offences subject to obtaining the consent of the DPP as provided in section 26 (2) of the EOCCA. But further to that, a certificate of transfer has to be issued by the DPP stating that the economic offence triable by the High Court be tried by a certain subordinate court as per the dictates of section 12(3) of the EOCCA which provides: -

"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. "

Furthermore, where a charge sheet contains a combination of both economic and non-economic offences to be tried together, the mandate is given under section 12 (4) of the EOCCA which stipulates as follows: -

"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 case at hand, the DPP issued the certificate to the Bariadi District Court to try the offences alleged to have been committed by the appellant under section 12 (3) of the EOCCA, which as argued by Mr. Jairo was improper. The issued certificate is reflected at page 5 of the record of appeal and we wish to reproduce it herein for ease of reference: -

"CERTIFICATE

I, **YAMIKO ALFREDY MLEKANO**, State Attorney In-charge, having been duly appointed by the **DIRECTOR OF PUBLIC PROSECUTIONS** under Section 12 (3) of the Economic and Organized Crimes Control Act, Cap. 200 [R.E. 2002], **DO HEREBY** in the Public interest Order that the accused persons namely **WILLIAM S/O KILUNGA @ SABASABA** and **MASUNGA S/O SINDELWA** who are charged with the offences of:-

UNLAWFUL POSSESSION OF WEAPON IN A NATIONAL PARK, contrary to section 24 (1) (b) (2) of the National Parks Act. Cap.282 R.E 2002 read together with GN No. 235 of 1968 and Paragraph 14 (c) of the First Schedule to and Section 57 (1) and 60 (2) of the Economic and Organized Crimes Control Act, Cap.200, **UNLAWFUL HUNTING IN A NATIONAL PARK** contrary to section 23 (1), (2) (a) of the National Parks Act Cap 282 R.E. 2002 read together with GN No. 235 of 1968 and Paragraph 14 (a) of the First Schedule to and Section 57 (1) and 60 (2) of the Economic and Organized Crimes Control Act, Cap.200, and **UNLAWFUL POSSESSION OF GOVERNMENT TROPHIES** Contrary to section 86(1)(2) (c)(ii) of the Wildlife Conservation Act, No.5/2009 read together with Paragraph 14 (d) of the First Schedule to and Section 57 (1) and

*60 (2) of the Economic and Organized Crimes
Control Act, Cap.200,*

*BE TRIED by the DISTRICT COURT OF BARIADI
DISTRICT at BARIADI.*

***SIGNED at BARIADI this 14th day of March,
2016.***

***SGD
Yamiko A. Mlekano
SENIOR STATE ATTORNEY IN-CHARGE***

Basing on the cited provision of section 12 (3) of EOCCA referred in the certificate, the DPP conferred jurisdiction to the District Court of Bariadi to try economic offences only. We state that to be improper as the charge laid at the door of the appellant has a non- economic offence as well in the first count to wit; unlawful entry into the National Park contrary to sections 21 (1), (2) and 29 of the National Parks Act. Since the appellant was charged with both economic and non-economic offences, the DPP ought to have issued 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 as rightly submitted by Mr. Jairo. We have times and again reiterated this legal stance in our various decisions including **Niko Mhando & 2 Others v. Republic**, Criminal Appeal No. 332 of 2008, **Magesa Chacha & Another v.**

Republic, Criminal Appeal No. 222 of 2011 and **Jovinary Senga & 3 others v. Republic**, Criminal Appeal No. 157 of 2013 (all unreported) to mention but a few. More recently, the Court in a similar situation in **Kingolo Limbu @ Tina and Kube Lyongo @ Zumbi v. Republic**; Criminal Appeal No.445 of 2017 quoting the case of **Emmanuel Rutta v. Republic**; Criminal Appeal No.148 of 2011 (both unreported) observed: -

"...because the learned Principal State Attorney complied only with section 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."

We therefore agree with Mr. Jairo that in the absence of the certificate conferring jurisdiction under section 12 (4) of the EOCCA, an economic offence could not be tried in combination with non-economic offences in a subordinate court (the trial District court of Bariadi) for want of jurisdiction as decided in the case of **Kingolo Limbu @ Tina and**

Kube Lyongo @ Zumbi (supra). As to the consequences in the circumstances where the DPP issued a certificate under section 12 (3) to try both economic and no-economic offences instead of section 12 (4) of the EOCCA, the Court in **Ally Salum @ Nyuku v. Republic**; Criminal Appeal No.87 of 2020 stated as follows: -

"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 our view therefore, the case at hand has to follow suit. On the other hand, the certificate has yet another flaw whereby it conferred jurisdiction to the District Court to try an offence of unlawful hunting which was not levelled against the appellant in the charge sheet. This as well rendered the certificate invalid.

Given the circumstances, we are inclined to agree with Mr. Jairo that the purported trial was a nullity. We are therefore compelled to invoke revisional jurisdiction under section 4 (2) of the AJA as we hereby

do to nullify the proceedings of both the trial and first appellate courts, quash convictions and set aside the sentences imposed on the appellant.

The next issue for consideration is whether or not to order retrial. Upon perusal of the record of appeal, we are in agreement with Mr. Jairo on the apparent irregularities and lack of evidence he pointed out which we need not recapitulate to avoid repetition. We will however mention some as examples to wit;- the absence of clear boundaries between the National Parks and where the appellant was found, thus it is not certain if the appellant was apprehended in the National Park, but further the omission to read out and explain the evaluation and inventory forms to the appellant, means he was convicted on the basis of documentary evidence he was not aware of though present in court. These defeat the principles of a fair trial. But also, the District Game Officer (PW4) who issued the inventory and trophy evaluation certificate is not among those capable of doing so as per mandatory dictates of section 86 (4) and 114 (3) of 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 to mean wildlife officer, a wildlife warden and a wildlife ranger, hence her competence questionable, to mention some. In view of the factual circumstance of

this case therefore, ordering retrial would amount to give a chance to the prosecution to fill in gaps and indeed, that will not serve the interests of justice. Consequently, we order an immediate release of the appellant from prison unless otherwise lawfully held for some other cause.

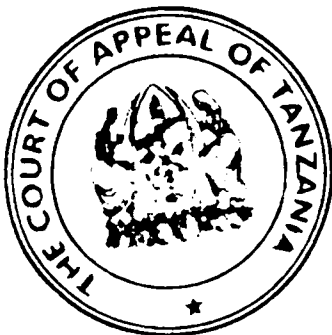
DATED at SHINYANGA this 23rd day of August, 2021.

F. L. K. WAMBALI
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

L. G. KAIRO
JUSTICE OF APPEAL

The Judgment delivered this 24th day of August, 2021 in the presence of appellant in person and Ms. Salome Mbughuni, Senior State Attorney assisted by Mr. Nestory Mwenda and Venance Mkonongo, learned State Attorneys for Respondent/Republic, is hereby certified as true copy of the original.



[Signature]
D. R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL