IN THE COURT OF APPEAL OF TANZANIA
AT MUSOMA

(CORAM: JUMA, C.J., WAMBALI, J.A. And KITUSI, J.A.)

CRIMINAL APPEAL NO. 512 OF 2019

DOGO MARWA @ SIGANA.....1ST APPELLANT
MWITA BAITOM @ MWITA .....2ND APPALLENT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the Judgment of Resident Magistrate's Court of Musoma (Extended Jurisdiction) at Musoma)

(Ng'umbu, RM EXT. JUR.)

dated the 17th day of October, 2019

in

Criminal Appeal No. 17 of 2019

JUDGMENT OF THE COURT

18th & 21st October, 2021

JUMA, C.J.:

The first appellant, DOGO MARWA @ SIGANA, and the second appellant, MWITA S/O BAITOM @ MWITA, were jointly and together with two others who absconded the trial, charged in the District Court Serengeti in three counts. The first count was in respect of the offence of unlawful entry into the national park contrary to Sections 21(1) (a) and (2) and 29(1) of the National Parks Act Cap 282 as amended by the Written Laws (Miscellaneous

Amendments) Act No. 11 of 2003 (the NPA). The particulars of this count were that at around 14:00 hours on 23/01/2016, at Milima Soroi area in the Serengeti National Park within Serengeti District in Mara Region; they entered that park without the permission of the Park Director.

The second count is related to the offence of unlawful possession of weapons in the national park contrary to section 24(1)(b) and (2) of the NPA. The particulars were that at around 14:00 hours on 23/01/2016, at Milima Soroi area in the Serengeti National Park, the appellants were found unlawfully possessing weapons without a permit. The weapons concerned were a machete (*panga*), two animal snaring wires intended to hunt, kill, wound, or capture animals.

The prosecution also charged the appellants with the third count of unlawful possession of government trophies, whose statement of the offence read as follows:

> *"Unlawful Possession of Government Trophy contrary to section 86 (1) and (2)(b) of the Wildlife Conservation Act No. 05 of 2009 read together with Paragraph 14 of the First Schedule to and sections 57 (1), 60 (2) of the Economic and Organized Crime Control Act [Cap. 200 R.E. 2002] as*

amended by section 13 and section 16 of the Written Laws (Miscellaneous Amendments) Act No. 3 of 2016."

The particulars of the third count are that on the 23rd day of January, 2016 at around 14:00 hours at Milima Soroi area in Serengeti National Park they were jointly found in possession of Government trophies, that is, four dried pieces of wildebeest meat, valued at Tshs. 1,417,000/=which was the property of the Government of Tanzania.

The prosecution case relied on the evidence of two park rangers, Nurdin Bawaziri (PW1) and Moses Kaijage (PW2), and a government trophy-valuer, Wilbroad Vicent (PW3), who tendered the evidence of trophy valuation certificate (exhibit P.E. 3).

The rangers stated that their primary duty is to guard the wildlife against poachers. Both PW1 and PW2 testified that on 23/1/2017, they were patrolling at the Milima Soroi area when they saw wire traps for capturing animals. On closer inspection of the site, they saw human footprints, which they followed up around the bush and found four people with two trapping wires and four dried pieces of wildebeest meat. The four, including the two appellants, identified themselves and explained that they did not have any permit to be in the park or to possess the Government trophies. The Park

rangers took the appellants and their two colleagues first to Robanda Police Station and later to Mugumu Police Station. The police opened a criminal case file Number MUG/IR/341/2017. Both appellants did not object when PW1 offered to tender the two animal trap wires and the machete, which the trial magistrate admitted both as exhibit P.E.2.

On 24/1/2017, which was a day following the appellants' arrest, PW3, a Wildlife Warden from Ikorongo-Grumet Game Reserves, was summoned to Mugumu Police Station around 09:00 hrs. The police first asked him to identify and value the government trophies earlier found in the appellants' possession. PW3 valued the four pieces of dried wildebeest meat at USD 650, which is the value of a live wildebeest. At the exchange rate of one US Dollar to Tanzanian shillings 2,180, he arrived at the total value of Tshs. 1,417,000/=. The two appellants did not object when PW3 tendered his Trophy Valuation Certificate. The trial magistrate admitted the certificate as exhibit P.E. 3.

In his defence, the first appellant (DW1) denied that rangers arrested him within the national park. He explained that he and his sibling brother Mwita Baitom had on 23/1/2017 gone to Nyakitono village to help out their sister who was building her house. After finishing building a goat shed, the two brothers went out to swim in the Rubana river bordering the national park. It

was while they were swimming when the park rangers surrounded and arrested them. The rangers took them to their vehicles, where the two appellants found the first and fourth accused already in the car. The rangers transported them to Mugumu Police station on 25/01/2017, where the police charged them with an offence they did not commit. DW1 expressed his concern over the contradiction in the evidence of two prosecution witnesses. While PW1 testified that the rangers took the appellants to Robanda Police Station, PW2 testified that they took them to Mugumu Police Station. He pointed out that both PW1 and PW2 did not testify that the park rangers arrested the appellants at Milima Soroi area.

The second appellant, DW2, gave similar evidence to DW1, who he identified as his brother. The second appellant did not know anything about Milima Soroi, where the prosecution allegedly arrested them. DW2 reiterated that no exhibit was found in their possession when the park rangers surrounded them in the river.

The learned trial Magistrate (Ismael E. Ngaile-RM) convicted the appellants in all three counts. In the first count of unlawful entry into the National Park, he sentenced the appellants to serve two years in prison. For the second count of illegal possession of weapons in the National Park, he

ordered the appellants to serve two years prison terms. The trial magistrate sentenced the appellants to serve twenty years in prison with respect to the third count for illegal possession of government trophies. He ordered the sentences to run concurrently.

The appellants were aggrieved with their convictions and sentences, and therefore they filed a first appeal before the High Court at Musoma in which they faulted the trial magistrate for among other grounds, relying on shaky and weak evidence of PW1, PW2 and PW3.

On 11/09/2019, J.R. Kahyoza, J. invoked section 45 (1) and (2) of the Magistrates Courts Act, Cap. 11 R.E 2002 [now R.E. 2019] and transferred the appeal to the Resident Magistrate's Court of Musoma to be heard and determined by W.S. Ng'humbu-RM on extended jurisdiction.

The first appellate court (W.S. Ng'humbu-RM EJ) dismissed the appellants' appeal after agreeing with the trial court that the evidence of PW1, PW2, and PW3 proved beyond reasonable doubt that the appellants were found and arrested within the Serengeti national park at Milima Soroi area. Further, exhibits PE2 and PE3 proved that they were found in possession of weapons associated with hunting animals in the national park.

In their separate Memorandum of Appeal to the Court, the appellants raised five identical grounds of appeal, which we have paraphrased as follows.

Firstly, the prosecution evidence relied on to convict them was shaky, weak, and not corroborated by an independent witness.

Secondly, the Director of Public Prosecutions did not furnish his consent before being charged with an economic offence.

Thirdly, the two courts below were wrong to rely on both the fabricated evidence of PW3 and the trophy valuation certificate (exhibit PE3).

Fourthly, the trial and first appellate courts completely ignored the defence evidence and relied entirely on prosecution evidence.

Fifthly, failure by the two courts below to sufficiently consider and evaluate the entire evidence led to a wrong decision, that is, their conviction.

At the second appeal hearing on 18/10/2021, the appellants appeared remotely by video link between the High Court at Musoma and Musoma Prison. The learned Senior State Attorney, Mr. Valence Mayenga, appeared for the respondent Republic. Learned State Attorneys Mr. Yesse Temba and Mr. Roosebert Nimrod Byamungu assisted Mr. Mayenga. The unrepresented

appellants relied on their grounds of appeal, which they preferred to let the State Attorneys respond to first.

Mr. Mayenga supported the appeal but on the ground of lack of jurisdiction, which is not amongst the grounds the appellants had preferred. He elaborated that the State Attorney-in-Charge of Mara Region's Certificate under section 12(3) of the Economic and Organized Crime Control Act, Cap 200 R.E. 2002 [now R.E. 2019] (the EOCCA), conferred jurisdiction to the trial Serengeti District Court to try economic offences only. This Certificate under section 12(3), he added, could not apply to the charge sheet, where the appellants faced a count of an economic crime, together with two counts of non-economic offence. In so far as Mr. Mayenga is concerned, the trial court wrongly assumed jurisdiction over both economic and non-economic offence, which it did not have under the Certificate issued under section 12(3) of the EOCCA. He urged that the State Attorney-in-charge should have instead conferred jurisdiction to the trial District Court of Serengeti under section 12(4) of the EOCCA.

In light of the outlined jurisdictional error, he urged us to invoke the Court's power of revision under section 4(2) of the Appellate Jurisdiction Act, Cap. 141 [now R.E. 2019] (the AJA) to nullify the trial proceedings and first

appellate court's because the District Court of Serengeti lacked jurisdiction to hear economic and non-economic offences. He referred us to our earlier decision in **MHOLE SAGUDA NYAMAGU V. R.** CRIMINAL APPEAL NO. 337 OF 2017 [TANZLII]. In that decision, the Court restated that prosecution cannot take place under one charge sheet, which involves an economic crime, together with a non-economic crime without the Certificate conferring jurisdiction to a subordinate court issued under section 12(4) of the EOCCA.

The appellants were inevitably pleased with the support of their appeal. They expressed their eagerness to return to their families after spending six years in prison.

It is needless to restate that jurisdiction is the threshold, and it touches the courts' competence to seize the matter presented before them. Simply put, courts in Tanzania cannot try cases if they do not have jurisdiction.

Section 57(1) of the EOCCA is a jurisdictional provision. It designates offences scheduled as economic offences and triable by the Corruption and Economic Crimes Division of the High Court (the ECD). The offence of unlawful possession of a Government trophy contrary to section 86 of the Wildlife Conservation Act [Act No. 5 of 2009] is scheduled as an economic

offence, triable in the ECD. The jurisdiction of the ECD over economic offences is not exclusive. Section 12 (3) of the EOCCA empowers the Director of Public Prosecutions (DPP) or any State Attorney he duly authorizes, to confer jurisdiction to subordinate courts over economic offences he specifies under certificates. The relevant jurisdiction-conferring subsection (3) states:

> *(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* ***[the ECD]*** *under this Act* ***be tried by such court subordinate to the High Court*** *as he may specify in the certificate.* [Emphasis added].

Subsection (4) of section 12 envisages circumstances where economic and non-economic may be tried together by a subordinate court. Here again, the law empowers the Director of Public Prosecutions (DPP) or any State Attorney he duly authorizes to confer jurisdiction to subordinate courts over the non-economic offence or both an economic offence and a non-economic offence he specifies under a certificate. The jurisdiction-conferring section 12(4) states:

(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 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.

We agree with Mr. Mayenga that the Certificate of the State Attorney in charge of Mara Region appearing on page 6 of the record of this appeal does not confer jurisdiction to the District Court of Serengeti to try an economic offence alongside non-economic offence, under one charge sheet. The trial district court wrongly assumed jurisdiction, which it did not have. This jurisdictional irregularity calls for exercising our power of revision under section 4 (2) of the AJA. As a result, we quash and set aside the entire proceedings, orders and judgments in the trial District Court of Serengeti and those of the first appeal (Criminal Appeal No. 17 of 2019) in the Resident Magistrate's Court of Musoma (Extended Jurisdiction), as we hereby do.

We still wanted Mr. Mayenga to address whether this Court should order a retrial based on a proper Certificate to be issued by the Director of Public Prosecutions under section 12(4) of EOCCA which is applicable in this case.

We did not let him off even after he urged us to simply allow the appeal and set the appellants free. We also asked him whether section 21(1) (a) and (2) of the NPA under which the prosecution charged the appellants, still creates the offence of unlawful entry into the national park. As amended by Act No. 11 of 2003, section 21(1) states:

> *"21 (1) Any person who commits an offence under this Act shall, on conviction, if no other penalty is specified, be liable-*
>
> *(a) in the case of an individual, to a fine not exceeding five hundred thousand shillings or to imprisonment for a term not exceeding one year or to both that fine and imprisonment.*
>
> *(2)-Any person who contravenes the provisions of this section commits an offence against this Act.*

Mr. Mayenga readily conceded that the action or conduct *(actus reus),* which is a constituent ingredient of the offence of unlawful entry into the national park, is not reflected in the body of section 21 of the NPA. In other words, the physical act or conduct of going into the national park or remaining in the national park is no longer part of section 21 of the NPA as it stands now. He agreed that it is not enough to constitute the offence of unlawful

entry by a mere statement in the marginal note, stating *"restriction on entry into national parks."* He added that there could be no offence of unlawful entry into the national park, where the body of the section creates no such crime. We could not but agree with the learned Senior State Attorney.

Ironically, before the amendment of the NPA by Act 11 of 2003, section 21 clearly disclosed an offence of unlawful entry into national parks:

> *"21(1) Subject to the provisions of section 15,* ***it shall not be lawful*** *for any person other than—*
>
> *(a) the Trustees, and the officers and servants of the Trustees; or*
>
> *(b) a public officer on duty within the national park and his servants,*
>
> ***to enter or be within a national park except under and in accordance with a permit in that behalf issued under regulations made under this Act.***
>
> *(2) Any person who contravenes the provisions of this section commits an offence against this Act."* [Emphasis added.

It is now apparent that the amendment brought under Act No. 11 of 2003 deleted the *actus reus* (illegal entry or illegal remaining in a national park) and got confusion in section 21(1) of the NPA. As far as we are

concerned, the appellants were charged, tried, convicted, and sentenced for a non-existent offence of unlawful entry into Serengeti National Park.

Next, in all the three counts; of unlawful entry, unlawful possession of weapons, and unlawful possession of Government trophies, the prosecution alleged that the park rangers arrested the appellants at MILIMA SOROI (the Soroi hills) area of the Serengeti National Park.

We are now certain that the learned trial magistrate misapprehended the defence evidence when he remarked that *"the 2nd and 3rd accused persons did not give any evidence to contest the prosecution evidence and/or raise any doubt thereto while the 1st and 4th accused were at large after being granted bail."* The record of appeal shows that in their respective defence; the appellants disputed the prosecution evidence claiming the park rangers apprehended them inside the National Park at Milima Soroi area. They defended themselves that as they were swimming in the river outside the boundaries of Serengeti National Park, the rangers arrived to arrest them. On his part, the first appellate Resident Magistrate on Extended Jurisdiction made a brief remark on the appellants' defence: *"On their defence, the appellants asserted before the trial court that they were arrested by park rangers when they were on the way to* Nyakitono village." As they did in their fourth ground

of appeal, the appellants are fully justified to complain that the two courts below relied on prosecution evidence and ignored the defence evidence.

We were somewhat surprised by the very casual and perfunctorily way; the national park rangers testified that they arrested the appellants at Milima Soroi areas, within the Serengeti National Park. We pointedly asked the learned Senior State Attorney whether the Milima Soroi area is within statutory boundaries of the Serengeti National Park. Mr. Mayenga submitted that section 5 (1) read together with the First Schedule to the NPA, describe the statutory boundaries of the Serengeti National Park:

> *"5. -(1) The area specified in the First Schedule to this Act is declared a National Park to be called the Serengeti National Park:"*

After reading through the First Schedule, which provides the outlines of the boundaries of the Serengeti National Park, Mr. Mayenga conceded the Milima Soroi area where the park rangers supposedly arrested the appellants, does not appear under the First Schedule marking the boundaries of the national park. We need not reemphasize that the prosecution evidence on record, did not prove beyond reasonable doubt that the park rangers arrested the appellants within the statutory boundaries of the Serengeti National Park.

From the above perspective, we return to the question we posed earlier, whether the circumstances of this case warrant a retrial. Over the years, the decision of the former Eastern African Court of Appeal in **FATEHALI MANJI V. R** [1966] 1 EA 343 has provided a helpful guide to courts in Tanzania when considering whether to order a retrial. The Eastern African Court of Appeal had guided that:

> *"...In general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered when the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered; each case must depend on its own facts and circumstances and an order for a retrial should only be made where the interests of justice require it."*

In light of all the shortcomings outlined above, a new trial will not serve the best interests of justice for the appellants.

Having said so much, we allow the appeal, quash the convictions of the two appellants, and set aside their respective sentences. The appellants shall be freed immediately, unless they are otherwise lawfully held.

Order accordingly.

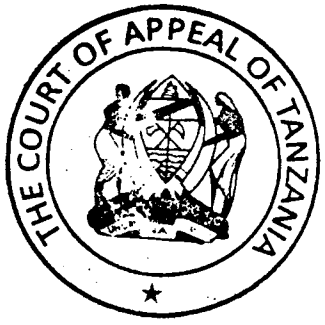
DATED at **MUSOMA** this 20th day of October, 2021.

I. H. JUMA
CHIEF JUSTICE

F. L. K. WAMBALI
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

The Judgment delivered this 21st day of October, 2021 in the Presence of Mr. Frank Nchanila, learned State Attorney for the Respondent/Republic and the Appellant appeared remotely via Video link from Musoma Prison is hereby certified as a true copy of the original.



K. D. MHINA
REGISTRAR
COURT OF APPEAL