IN THE COURT OF APPEAL OF TANZANIA
AT SHINYANGA

(CORAM: MKUYE, J.A., GALEBA, J.A. And KAIRO, J.A.)

CRIMINAL APPEAL NO. 279 OF 2018

KURWA LIMBU @ MUSHA..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Kibella, J.)

dated 6th day of August, 2018
in
Criminal Appeal No. 67 of 2016

JUDGMENT OF THE COURT

6th & 18th July, 2022

KAIRO, J.A.:

This appeal arises from the decision of the High Court of Tanzania at Shinyanga (Kibella, J.), in Criminal Appeal No. 67 of 2016 dated 6th August, 2018. In that appeal, the High Court upheld the decision of the District Court of Bariadi in Economic Crime Case No. 26 of 2013 in which the appellant, Kurwa Limbu @ Musha and four others who are not parties to this appeal were jointly and together charged on one count under the Wildlife Conservation Act No. 5 of 2009 (the WCA) and three counts under the Economic and Organized Crime Control Act, [Cap 200 R.E. 2002, now R.E. 2022] (the EOCCA).

In the first count, they were charged with unlawful entry into a Game Reserve without permit contrary to section 15 (1) and (2) of the WCA. It was alleged that on 2nd June, 2013 at about 18.00 hrs at Mwamantilie area into Maswa Game Reserve within Bariadi District in Shinyanga Region, the accused persons were found to have entered into the said legally restricted area without having any written permit from the Director of Wildlife.

In the second count they were charged with unlawful possession of weapons into the Game Reserve contrary to section 17 (1) and (2) of the WCA read together with paragraph 14 (c) of the First Schedule to the EOCCA. It was further alleged that, on the same date, time and place, they were found in unlawful possession of weapons to wit; one knife and a torch into Maswa Game Reserve without any permit and failed to satisfy the authorized officer that the said weapon and a torch were intended to be used for the purpose, other than hunting, killing, wounding or capturing of animals.

As for the third count, they were charged with unlawful hunting in a Game Reserve c/s 19 (1) and (2) of the WCA read together with paragraph 14 (a) of the First Schedule to the EOCCA. In this regard, it was alleged that on the same date, time and place, the five accused

were found hunting animals to wit: - Fourteen Thomson Gazelle and one Dikdik in the Game Reserve without having any written permit from the Director of Wildlife.

For the fourth and last count, the accused were charged with unlawful possession of Government Trophies contrary to section 86 (1), (2) (c) (ii) and 3 (b) of the WCA read together with paragraph 14 (d) of the First Schedule to and section 57 (1) of the EOCCA. According to the particulars of offence, for this count, it was alleged that on the same date, time and place, the accused were found in unlawful possession of Government Trophies to wit; fourteen fresh heads, fifty-six fresh limbs, both the heads and the limbs being of Thomson Gazelle equal to one killed animal valued at TZS. 10,080,000/= and one carcass of Dikdik equal to one killed animal valued at TZS. 400,000/=. Both animals were valued at a total of TZS. 10,480,000/=, the property of the Government of Tanzania.

The accused pleaded not guilty to all the counts. In the course of trial, all of the accused except the appellant jumped bail and the case proceeded in their absence under section 226 of the Criminal Procedure Act, [Cap 20 R.E. 2002 now R.E 2022] (the CPA). After a full trial, the appellant and his fellows were found guilty and convicted of all the four

counts and the following sentences were imposed on them:- for the first count, they were sentenced to pay a fine of TZS. 100,000/= or in default to serve two years in prison each; for the second count, each one of them was sentenced to pay a fine of TZS. 200,000/= or in default to serve three years imprisonment; and as for the third count, they were each sentenced to pay a fine of TZS. 300,000/= or in default to serve three years imprisonment. Regarding the fourth count they were each sentenced to pay a fine of TZS. 20,960,000/= or in default to serve twenty years imprisonment.

Dissatisfied with the decision of the trial court, the appellant appealed to the High Court of Tanzania at Shinyanga where Kibella J. dismissed his appeal in its entirety on 6th August, 2018. Undaunted, he lodged the present appeal raising six (6) grounds of appeal. However, for the reasons which will become apparent herein, we shall not consider them.

At the hearing, the appellant appeared in person, unrepresented, while Ms. Verediana Peter Mlenza, learned Senior State Attorney teaming up with Misses Rehema Sakafu and Edith Tuka, both learned State Attorneys represented the respondent Republic.

When invited to argue his appeal, the appellant adopted his grounds of appeal and further prayed to let the respondent respond to his grounds first and reserved his right to make rejoinder if the need to do so would arise. In the premises, we invited the respondent to commence her arguments.

From the outset, Ms. Sakafu declared the respondent's stance of supporting the appeal on account of a point of law relating to the jurisdiction of the trial court to entertain and determine the matter.

Expounding, Ms. Sakafu submitted that the certificate issued by the Director of Public Prosecutions (the DPP) conferring the jurisdiction to hear the offences charged against the appellant and his fellows to the trial court was issued under the provisions of section 12 (3) of the EOCCA. However, the charge involved both economic and non-economic offences whereby the first count concerned a non-economic offence while the rest counts were economic offences. She went on to submit that in a trial by a subordinate court involving a combination of both economic and non-economic offences, the proper provision under which the DPP's certificate is to be issued is section 12(4) of the EOCCA. It was therefore, her argument that the District Court of Bariadi where the jurisdiction was conferred to, had no jurisdiction to hear and determine

the matter in the circumstances, and as a result the entire proceedings of the District Court were rendered a nullity and the decision thereon null and void. She cited to us our previous case of **Maduhu Mashangi v. The Republic**, Criminal Appeal No. 228 of 2017 (unreported) to buttress her argument. On that account, she implored us to invoke the Court's revisional powers under the provisions of section 4(2) of the Appellate Jurisdiction Act, [Cap 141 R.E. 2019] (the AJA) and nullify the proceedings and judgment of the District Court of Bariadi and that of the High Court, quash the conviction of the appellant and set aside the sentence imposed on him.

On the way forward, Ms. Sakafu submitted that although the Court has the power to order a retrial after exercising its revisionary powers, nonetheless, she was of the view that such an order will neither be proper nor serve the interest of justice in the circumstance of the case at hand.

Clarifying the reason for the said way forward, Ms. Sakafu argued that the trial was flawed with other procedural irregularities such as:- **One;** the contents of exhibits P2, P3, P4 and P5 were neither explained to the accused by the prosecution witnesses who tendered them, nor were they read over after being admitted by the trial court as evidence

so that the accused could know the contents of the said documents and prepare their defence. On this infraction, she invited the Court to expunge the exhibits from the records of appeal. **Two;** although the inventory form shows that the perishable trophies were disposed of on 4th July, 2013, it does not contain the signatures of the accused persons to verify their presence during disposal of the exhibits alleged to have been in their possession, more so when taking into account that on that date the accused persons were in court to answer the charge and enter their plea. She argued that the said state of affairs suggests that the accused persons were neither present nor involved in the disposal process to witness the actual trophies and have an opportunity to raise an objection if any, before disposal and sign the inventory accordingly. Thus, she was of the view that the trial was not fair against the accused. She referred us to the case of **Emmanuel Saguda @ Sulukuka & Another v. The Republic,** Criminal Appeal No. 422 "B" of 2013 (unreported) to back up her argument. Following the irregularities pointed out, Ms. Sakafu concluded that the order for re-trial will not be in the interest of justice. Instead, the only remedy available is to nullify the proceedings and judgments of both the trial and first appellate

courts, quash the conviction and set aside the sentence imposed on the appellant and release him forthwith, she contended.

When invited to rejoin, the appellant conceded to Ms. Sakafu's submissions and prayed the Court to set him free.

From the submission by Ms. Sakafu and the record before us, the issue for our determination is whether the certificate issued by the Principal 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 subordinate court can validly try an economic offence as per section 26 (1) the EOCCA. But further to that, a certificate conferring jurisdiction to a subordinate court 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 vesting jurisdiction to the Bariadi District Court to try the offences alleged to

have been committed by the appellant and his fellows under section 12 (3) of the EOCCA, which as rightly argued by Ms. Sakafu was improper. The issued certificate is reflected at pages 4 of the record of appeal and we wish to reproduce it herein for ease of reference: -

"IN THE DISTRICT COURT OF BARIADI DISTRICT
AT BARIADI

ECONOMIC CRIME CASE NO. 26 OF 2013
REPUBLIC
VERSUS

1. *KURWA S/O LIMBU @ MUSHA*
2. *MAGURU S/O KIBUNGU @ LUMENI*
3. *KEREJAS/O LIMBU @ MUSHA*
4. *MAHUSI S/O SILIMA @ NHINGI*
5. *MARCO S/O KINDA @ NTOBIGO*

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 Crime 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) and 14 (d) of the First Schedule to the Economic and Organized Crime Control Act, [Cap 200 R.E. 2002] BE TRIED by the District Court of Bariadi at Bariadi.* [emphasis supplied]

Signed *at* ***Shinyanga*** *this 4th day of July,* ***2013.***

SGD
Timon Vitalis
PRINCIPAL STATE ATTORNEY IN-CHARGE"

Basing on the cited provisions of section 12 (3) of the EOCCA referred to in the certificate, the Principal State Attorney In Charge conferred jurisdiction to the District Court of Bariadi to try economic offences only. However, 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 a Game Reserve without permit contrary to sections 15 (1) and (2) WCA. Since the appellant was charged with both economic and non-economic offences, the Principal State Attorney In Charge 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 Ms. Sakafu. We have times and again reiterated this legal stance in our various decisions including **Mabula Mboje & 2 Others v. Republic**, Criminal Appeal No. 557 of 2016, **Dotto Mayala @ Masunga & Another v. Republic**, Criminal Appeal No. 224 of 2017, **William Kilunga v. Republic**, Criminal Appeal No. 447 of 2017 and **Kingolo Limbu @ Tina and Kube Lyongo @ Zumbi s. Republic**; Criminal Appeal No. 445 of 2017 (all unreported) to mention but a few. The Court in **Kingolo Limbu @**

Tina and Kube Lyongo @ Zumbi (supra) quoted the case of **Emmanuel Rutta v. Republic,** Criminal Appeal No.148 of 2011 wherein it was 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 Ms. Sakafu 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 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 or the Principal State Attorney In Charge issues a certificate under section 12 (3) to try both economic and no-economic offences instead of section 12 (4) of the EOCCA, we entirely and respectfully subscribe to the

argument by Ms. Sakafu that no jurisdiction was conferred to the trial court, as a result the whole proceedings and the decisions in both the trial and first appellate court was rendered a nullity. We have previously stated the said stance in **Ally Salum @ Nyuku v. Republic**; Criminal Appeal No. 87 of 2020 (unreported) wherein we observed 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. Consequently, we are 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. We further quash the convictions and set aside the sentence 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 again in agreement with Ms. Sakafu on the pointed-out anomalies which in our considered view,

makes an order of retrial inappropriate. Indeed, exhibits P4 and P5 (inventory form and Trophy Valuation Certificate as well as the cautioned statements of the 1st and 5th accused persons admitted as exhibits P1 and P2 were not read over to the accused persons after being admitted in court as evidence. The omission denied the accused persons an opportunity to know the contents of the said documents so as to prepare for their defence. It is noteworthy that these documents formed the basis of their conviction and sentence. To say the least, the omission defeated the principles of a fair trial. Besides, the lapse renders the exhibits invalid and liable for being expunged. [See the cases of **Robinson Mwanjisi and Others v. Republic** [2003] T.L.R. 218 and **Emmanuel Kondrad Yosipati v. Republic,** Criminal Appeal No. 269 of 2017 (unreported).

Further to that, the inventory form which shows the disposed exhibits alleged to have been found in possession of the appellant and his fellow bear no signature of the accused persons including the appellant. The absence of the appellant's signature suggests that the appellant was not present when the disposal was conducted. It is a settled procedural requirement that the accused has to be present during disposal process so as to afford him/her an opportunity to see

the actual trophies and have an opportunity to raise an objection if any. But this was not the case in the matter at hand.

That apart, PW1 who tendered the weapon and the torch did not explain how the same were handled from the time of seizure to the time of their production in court and their description so as to prove that they are the same items found in possession of the appellant and his fellows.

In view of the factual circumstance of this case therefore, ordering retrial, in our opinion is likely to prejudice the appellant. We are fortified in this stance from the famous case of **Fatehali Manji v. Republic** [1966] E.A 343 wherein the defunct Court of Appeal of Eastern Africa spelt out the guidelines in determining whether or not to order re-trial. It stated:

> *"In general, a retrial may be ordered only when the original trial was illegal or defective, it will not be ordered where the conviction is set aside because of insufficiency of evidence as for purposes of enabling the prosecution to fill in the 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 retrial should only be made where interest of justice require it and should not be ordered where it is likely to cause an injustice the accused person."*** [Emphasis supplied].

Basing on what we have endeavored to discuss, we order an immediate release of the appellant, Kurwa Limbu @ Musha from prison forthwith unless otherwise lawfully held for some other cause.

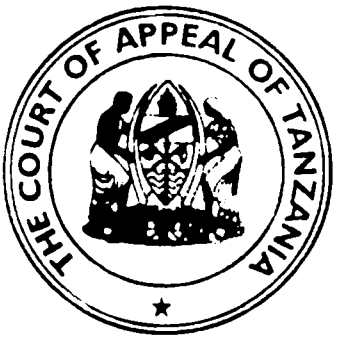
DATED at **SHINYANGA** this 16th day of July, 2022.

R. K. MKUYE
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

L. G. KAIRO
JUSTICE OF APPEAL

The judgment delivered this 18th day of July, 2022 in the presence of the appellant in person, and Ms. Verediana Peter Mlenza, Senior State Attorney assisted by Ms. Edith Tuka and Ms. Wampumbulya Shani, both learned State Attorneys for the Respondent/Republic is hereby certified as a true copy of the original.



F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL