

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: WAMBALI, J. A., KOROSSO, J.A. And RUMANYIKA, J.A.)

CRIMINAL APPEAL NO. 168 OF 2020

PETER MSIMBE 1ST APPELLANT

SELEMANI HAMID 2ND APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

**(Appeal from the decision of the Resident Magistrate Court of Dar es Salaam
with Extended Jurisdiction at Kisutu, Dar es Salaam)**

(Tiganga, PRM EXT. JUR.)

Dated the 2nd day of March, 2020

in

Criminal Appeal No. 12 of 2019

JUDGMENT OF THE COURT

4th July & 22nd September, 2022

WAMBALI, J.A.:

This appeal has been preferred by the appellants, Peter Msimbe and Selemani Hamid (the first and second appellants respectively) against the decision of the Resident Magistrate Court of Dar es Salaam at Kisutu under Extended Jurisdiction in Criminal Appeal No. 12 of 2019 presided over by Tiganga PRM – Ext. Jur. (as he then was).

It is noteworthy that initially, the appellants and Sinaraha Kimanga (not party to this appeal), appeared before the Resident Magistrate Court of Morogoro (the trial court) in Economic Crime Case No. 19 of 2016, where they were charged with three counts.

The first count, involved unlawful possession of Government Trophies contrary to section 86 (1) (2) (b) and (3) of the Wildlife Conservation Act [Cap. 283] (now R.E. 2022) ("the WCA") read together with Paragraph 14 of the First Schedule to and sections 57 (1) and 60 (2) of the Economic and Organised Crime Control Act [Cap. 200 R.E. 2002] (now R.E. 2022) as amended by the Written Laws (Miscellaneous Amendments) Act No. 3 of 2016 ("the EOCCA"). It was plainly alleged in the particulars in respect of this count that on 22nd September, 2016 at Mtipula village Mlole Mkata Ward within Morogoro District in Morogoro Region, the appellants and Sinaraha Kimanga were found in possession of Government Trophy, to wit; Buffalo meat valued at USD 1,900 equivalent to (TZS. 4,147,700.00) the property of the United Republic of Tanzania without a permit from the Director of Wildlife Division.

The second count concerned unlawful possession of Government Trophies contrary to section 86 (1) (2) (c) (iii) and (3) of the WCA as amended by the Written Laws (Miscellaneous Amendments) Act No. 4 of 2016 read together with Paragraph 14 of the First Schedule to and sections 57(1) and 60(2) of the EOCCA as amended by the Written Laws (Miscellaneous Amendments) Act No. 3 of 2016. The particulars alleged that on the same date and place the trio stated above were found in possession of Government Trophy, to wit; Wildebeest meat valued at USD 650 equivalent to (TZS. 1,418,950.00) the property of the United Republic of Tanzania without a permit from the Director of Wildlife Division.

The third count was in respect of unlawful possession of Government Trophies contrary to section 86 (1), 2(c) (ii) and (3) of the WCA as amended by the Written Laws (Miscellaneous Amendments) Act No. 4 of 2016 read together with Paragraph 14 of the First Schedule to and sections 57 (1) and 60(2) of the EOCCA as amended by the Written Laws (Miscellaneous Amendments) Act No. 3 of 2016.

The particulars in support of this count alleged that on the same date and place, the trio were found in possession of Government Trophy, to wit;

Impala meat valued at USD 390 equivalent to (TZS. 851,370.00) the property of the United Republic of Tanzania without a permit from the Director of Wildlife Division.

According to the record of appeal, on 8th November, 2017 the appellants and Sinaraha Kimanga, who were the first, second and third accused respectively, appeared before the trial court and when the charges comprising six counts were read over and explained to them they pleaded not guilty to the allegations. After several adjournments, the trial commenced on 4th April, 2018 focusing on three counts. The prosecution side paraded six witnesses and tendered three exhibits namely; Trophy Valuation Certificate, Search Order and Inventory of Exhibit. At the closure of the prosecution case, the appellants were found with a case to answer and ordered to enter their defences. The third accused, Sinaraha Kimanga was not found with a case to answer, hence he was acquitted in respect of all three counts.

In their respective defences, the appellants categorically denied to have been found in possession of Government Trophies as alleged in the charges and contended that on that day they were arrested while selling cow

and goat meat. Their defences were supported by Luwanda Simon Kalonga who testified that he knew the appellants as sellers of of tamed animals' meat though they had informal butchery.

At the height of the trial, the learned Principal Resident Magistrate who presided over the trial evaluated the evidence on record and came to the finding that the prosecution case was proved beyond reasonable doubt. She thus found the appellants guilty, convicted and sentenced each of them to serve a community service sentence for two years in respect of each count, to run concurrently.

The Director of Public Prosecutions (the DPP) was seriously aggrieved by the sentence imposed on the appellants, hence she appealed to the High Court of Tanzania at Dar es Salaam through Criminal Appeal, No. 119 of 2019. However, the said appeal was transferred to the Resident Magistrate Court of Dar es Salaam at Kisutu and registered as Criminal Appeal No. 12 of 2019 where it was presided over by the Principal Resident Magistrate with Extended Jurisdiction as intimated above.

During the hearing at the first appellate court the appellants strenuously contested the appeal with regard to both convictions and

sentences. However, in the end, the first appellate court allowed the DPP's appeal, reversed the sentences and substituted thereof with statutory sentences on each appellant as follows: a fine of USD 19,000 equivalent to TZS. 41,477,000.00 or to imprisonment for twenty years; USD 6,500.00 equivalent to TZS. 14,189,500.00 or to imprisonment for twenty years; and USD 3,900 equivalent to TZS. 8,513,700.00 or to imprisonment for twenty years for the first, second and third counts respectively. It was further ordered that should the appellants fail to pay the fines, the custodial sentences had to run concurrently.

The appellants' dissatisfaction with the first appellate court's decision prompted the present appeal through a joint memorandum of appeal comprising three grounds of appeal. However, at the hearing of the appeal, it was agreed by the parties and the Court that the epicentre of the appeal rests on the complaint in the first ground of appeal which is to the effect that:

"The first appellate court erred in law by enhancing the sentence while there was no consent and certificate of the DPP conferring jurisdiction on the

trial court to try economic offences against the appellants”.

At the hearing of the appeal, the appellants appeared in persons, unrepresented, whereas the respondent Republic was represented by Ms. Elizabeth Mkunde, learned Senior State Attorney assisted by Ms. Imelda Mushi, learned State Attorney.

The appellants adopted the sole ground of appeal and preferred to let the learned Senior State Attorney to respond to it, while they retained the right to re-join if the need arose.

At the very outset, Ms. Mkunde launched her submission by supporting the appeal on the contention that the trial court had no jurisdiction to try the case against the appellants for lack of the consent and certificate of the DPP as required by sections 26 (1) and 12 (3) of the EOCCA respectively. She submitted that there are two charge sheets which are apparent in the record of appeal. The first, she stated, was presented before the trial court on 27th October, 2016 comprising three counts involving the appellants and Sinaraha Kimanga, while the second was presented on 8th November, 2017 comprising six counts involving the same accused. She argued further that it is indicated

in the record of appeal that on 8th November, 2017 the State Attorney who prosecuted the case submitted the consent and certificate of the DPP conferring jurisdiction on the trial court which was admitted by the presiding Magistrate. It is further revealed that the said charge sheet was read over and the appellants pleaded not guilty in respect of all six counts. However, she submitted that according to the same record, it is apparent that the trial of the appellants commenced and was concluded based on three counts. In the circumstances, she argued, it is not clear which charge sheet between the two in respect of which the consent and certificate of the DPP was issued to the trial court. Unfortunately, she added, there are no copies of the consent and certificate of the DPP in the record of appeal to clear the doubts concerning the matter.

In this regard, the learned Senior State Attorney submitted that in the absence of copies of the consent and certificate of the DPP conferring jurisdiction on the trial court to try the said economic offences against the appellants as required by the law, it cannot be concluded that the proceedings of both the trial and first appellate courts were proper. On the contrary, she stated, the entire proceedings of the trial and first appellate courts are a nullity. She thus urged us to nullify the trial and first appellate

courts' proceedings, quash convictions and set aside the sentences imposed on the appellants.

On the way forward, Ms. Mkunde submitted that ordinarily she would have prayed for the retrial of the appellants. However, having carefully reviewed the facts of the case and considered the weaknesses of the prosecution case, she had no intention to press for a retrial of the appellants because miscarriage of justice will be occasioned. She thus implored the Court to set the appellants at liberty.

The learned Senior State Attorney's submission was graciously welcomed by the appellants who did not wish to offer any rejoinder.

On our part, we entirely agree with Ms. Mkunde that considering the record of proceedings of the trial court in the record of appeal, though there is indication that the consent and certificate of the DPP was presented before the trial of the appellants commenced, there is no evidence of the existence of copies of the respective documents in the record. We have taken considerable time to peruse the original record of the trial court's proceedings to establish the truth of the matter but the exercise was in vain. On the other hand, even if we are to assume that the consent and certificate

of the DPP were issued in respect of the charge sheet dated 8th November, 2017 containing six counts which was read over to the appellants and Sinaraha Kimanga who pleaded not guilty to all counts, still, the absence of the respective copies casts doubts on which charge sheet between the two the alleged consent and certificate was issued. This is so because the trial of the appellants, convictions and sentences proceeded in respect of three counts, presumably based on the first charge sheet which was presented during inquiry proceedings. On the contrary, it is on record that before the trial commenced, the appellants pleaded to the charge sheet comprising six counts and not three counts. More importantly, there is no indication in the record of appeal that the charge sheet containing six counts was substituted during the trial after the appellants pleaded not guilty. Apparently, the doubt was not sorted out by the first appellate court and indeed there is no indication that it was brought to its attention by the parties.

In the circumstances, considering the trial court's proceedings which resulted in the convictions and sentences of the appellants it cannot be safely concluded that the trial court was properly vested with the requisite jurisdiction by the DPP as required by sections 26 (1) and 12 (3) of the EOCCA to try the case since such jurisdiction cannot be simply assumed or

presumed but vested by the law. It is in this regard that in **Farnuel Mantiri Ng'unda v. Herman Mantiri Ng'unda and 20 Others**, Civil Appeal No. 8 of 1995 (unreported) the Court held that:

"The question of jurisdiction for any court is basic, it goes to the very root of the authority of the court to adjudicate upon cases of different nature... The question of jurisdiction is so fundamental that courts must as matter of practice on the face of it be certain and assured of their jurisdictional position at the commencement of the trial. It is risky and unsafe for the court to proceed with the trial of a case on the assumption that the court has jurisdiction to adjudicate upon the case."

In the case at hand, considering the record of proceedings in the record of appeal, we are satisfied that the trial court proceeded with the trial of the appellants in respect of three counts without the consent and certificate of the DPP conferring jurisdiction on it contrary to the provisions of the sections 26 (1) and 12 (3) of the EOCCA respectively. For clarity the respective provisions provide as follows:

"S.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."

"S.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."

Apparently, faced by such situation, in most cases the Court has no option but to nullify the proceedings of the trial and first appellate courts for being a nullity [see for instance **Mhole Saguda Nyamagu v. The Republic**, Criminal Appeal No. 337 of 2016 and **Ramadhani Omary Mtinda v. The Republic**, Criminal Appeal No. 62 of 2019 (both unreported)].

From the foregoing deliberations, we are settled that the learned Senior State Attorney properly declined to support the appellants' convictions and sentences in the case at hand. Equally, we are settled that weighing the scale of justice to the circumstances of the factual materials on record,

she properly declined to press for the retrial of the appellants since such an order will certainly occasion miscarriage of justice.

In the event, we allow the sole ground of appeal. Consequently, we invoke the power of revision bestowed on the Court to revise and nullify the proceedings of both the trial and first appellate courts, quash convictions and set aside the sentences imposed on the appellants. Ultimately, we order that the appellants be set free forthwith unless held lawfully for other causes.

DATED at DAR ES SALAAM this 16th day of September 2022.


F. L. K. WAMBALI
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

S. M. RUMANYIKA
JUSTICE OF APPEAL

The Judgment delivered this 22nd day of September, 2022 in the presence of 1st and 2nd Appellant via Video, and in the presence of Ms. Ester Kyala, Principal State Attorney for the Respondent is hereby certified as a true copy of the original.




J. E. FOVO
DEPUTY REGISTRAR
COURT OF APPEAL