IN THE COURT OF APPEAL OF TANZANIA
AT TABORA

(CORAM: MUGASHA, J.A., KEREFU, J.A., And MWAMPASHI, J.A.)

CRIMINAL APPEAL NO. 446 OF 2019

SAMSON AMON @ KAUGA..... APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the Decision of the High Court of Tanzania at Tabora)

(Mallaba, J.)

dated the 19th day of December, 2018
in
Criminal Appeal No. 106 of 2018

JUDGMENT OF THE COURT

14th & 17th March, 2023

KEREFU, J.A.:

In the Resident Magistrate Court of Tabora, the appellant, Samson Amon @ Kauga together with two others, namely, Almas Juma @ Umela and Daniel Bernard @ Kaombwe (the second and third accused respectively), who are not parties to this appeal, were jointly and severally charged with seven counts. The appellant, who was the first accused, was involved in six counts.

On the first, second and third counts, the appellant was charged with the offence of unlawful possession of firearms and ammunition contrary to

sections 20 (1), (2) and 21 of the Firearms and Ammunitions Control Act No. 2 of 2015 (the FACA) read together with paragraph 31 of the 1st Schedule to and sections 57 (1) and 60 (2) of the Economic and Organized Crime Control Act [Cap. 200 R.E. 2002] (the EOCCA) as amended by the Written Laws (Miscellaneous Amendments) Act No. 3 of 2016 together with section 103 of the Wildlife Conservation Act No. 5 of 2009 (the WCA). It was alleged that, on 22nd September 2016 at Iyombakuzola Village within Sikonge District in Tabora Region, the appellant was found in possession of 1 rifle gun make 375 and stock of rifle gun make 375, 7 bullets make 375 and 3 projectiles without a permit.

As for the fourth and fifth counts, the appellant was charged with unlawful possession of government trophies contrary to section 86(1) (2) (b) and (c) (ii) of the WCA as amended by the written laws (Miscellaneous Amendments) Act No. 4 of 2016 read together with paragraph 14 of the 1st Schedule to and sections 57(1) and 60(2) of the EOCCA. It was alleged that on the same date, time and place, the appellant was found in possession of 1 warthog tooth valued at TZS. 981,900.00, 1 piece of impala skin value at TZS. 850,980.00, 2 lion claws valued at TZS.10,691,800.00, 3 pieces of elephant tail hair valued at TZS 32,730,000.00, 1 piece of zebra tail valued

at TZS. 2,618,400.00, 1 piece of bufallo skin and ¼ liter of buffalo fat valued at TZS. 4,145,800.00 all make a total value of TZS. 52,018,880.00 the property of government of the United Republic of Tanzania without a permit.

The sixth count was for the second accused alone on the unlawful dealing in firearms and ammunition business contrary to section 32 (2) and 60 (1) of the FACA. It was alleged that on diverse dates of September, 2015 and September, 2016 at Tutuo within Sikonge District in Tabora Region, the second accused was dealing and trading in firearms and ammunition without permit.

On the seventh count, the appellant was charged with the offence of conspiracy contrary to section 384 of the Penal Code [Cap. 16 R.E 2002]. It was alleged that, on 15th September, 2016 during noon hours at the same place, the appellant conspired with one Daniel Bernard @ Kaombwe to effect unlawful hunting of government trophies.

The appellant and the duo denied the charge laid against them and therefore, the case had to proceed to a full trial. To establish its case, the prosecution paraded a total of six witnesses, seven documentary exhibits and three physical exhibits. On the other side, the appellant and the 3rd

accused relied on their own evidence as they did not summon any witness whereas the second accused summoned one witness.

In essence, the substance of the prosecution case, as obtained from the record of appeal is to the effect that, on 21st September, 2016, while Insp. Geofrey Rumanyika (PW1) together with other police officers were undertaking the operation of removing livestock from Nyahua Mbuga Forest Reserve, they received information from one Jafari Musa Lyimo (PW5) who was the then Manager of Ugalla Game Reserve that they have arrested the third accused who was in the process of purchasing rounds of ammunition for the Sub Machine Gun (the SMG) from Godfrey Japhet Nzamba (PW2). PW1 testified that, upon interrogation, the third accused admitted that he needed the said ammunition for his uncle (the appellant) for hunting purposes.

Subsequently, a trap was set, as the third accused was asked to phone the appellant over a loud speaker, in the presence of PW1 and other police officers and inform him that he had already purchased the said ammunition. It was the testimony of PW1 that, upon being informed that the ammunition were ready, the appellant admitted that he was waiting for the same and asked the third accused to bring the same to him on the next day. It was

the testimony of PW1 that, they did not wait for the next day, as at 23:00 hours, while led by the third accused, they started the trip to Sikonge at Mission Ward to the appellant's house. Upon arrival, they surrounded the area and awakened the appellant, who initially denied to own the gun, but later, after seeing the third accused, he admitted, although he said that he used to keep it at his cassava *shamba* which was at the distance of about 1.5 Kilometers from his house. PW1 stated that, they sought the assistance from the Hamlet leader of the area one Zakayo Mang'ombe who accompanied them to the appellant's *shamba* where they found a rifle gun, locally made though uses bullets make 375, hidden under the mango tree. PW1 stated further that, having removed grasses over the area, they found seven bullets make 375, 5 shells of bullets make 375, 3 shells of bullets of SR, gun powder rolled in the plastic bags.

Thereafter, they went back and searched the appellant's house and found one tooth of warthog, 2 lion craws, one piece of buffalo skin, 3 elephant tail hairs, 1 piece of impala skin, one buffalo tail, ¼ litre of buffalo oil in a jug and traditional medicines. The said government trophies were seized and a certificate of seizure was prepared and signed by the appellant, Zakayo Mang'ombe as an independent witness, Beatus Maganja and PW1.

The said certificate was admitted in evidence as exhibit P1. PW1 stated further that, he recorded the statement of Zakayo Mang'ombe which was admitted in evidence as exhibit P10.

Subsequently, they arrested the appellant and the third accused and brought them to KDU Tabora where PW1 interrogated the appellant who admitted to involve himself in unlawful hunting and that, he used to obtain bullets from the second accused. Upon receiving that information, PW1 and his team, with the assistance from the appellant, pursued and arrested the second accused on 23rd September, 2016. The appellant's cautioned statement was admitted in evidence as exhibit P8 and the rifle gun make 375, one buttstock make 375, 7 bullets make 375, five shells of bullets make 375, three bullets' shells of SMG/SR and the gun powder were collectively admitted in evidence as exhibit P2, while one piece of buffalo skin, one piece of buffalo tail, ¼ litre of buffalo oil, two lion craws, one piece of zebra tail, one warthog tooth, one skin of impala were collectively admitted as exhibit P3 and the various traditional medicines were collectively admitted as exhibit P4. PW1 went on to state that, he handed over all seized items to KDU and signed the handing over register which was admitted in evidence as exhibit P5 and the two requisition vouchers were admitted as exhibit P6 and P7.

Then, later, the trophies were weighed and valued by Jafari Musa Lyimo (PW5) at TZS. 52,018,880 who filled the trophy valuation certificate which was admitted in evidence as exhibit P9.

No. F 3434 D/C Mkama (PW6), testified that he was involved in the investigation of the incident and recorded the cautioned statement for the third appellant together with the statement of the independent witness one Zakayo Mang'ombe. The statement of Zakayo Mang'ombe was admitted in evidence as exhibit P10 under section 34B (2) (e) of the Evidence Act [Cap. 6 R.E. 2019] (the Evidence Act).

In their respective defences, the appellant and the duo denied to have committed the offence. In particular, the appellant, apart from admitting that he was arrested at his home on 21st September, 2016, he completely denied to have been found in possession of the items listed by the prosecution alleged to be found in his cassava *shamba* and in his house.

After a full trial, the trial court acquitted the second and third accused in respect of the sixth and seventh counts on account that the prosecution had failed to prove the case against them to the required standard. However, the appellant was found guilty and convicted of the charges in the first, second, third, fourth and fifth counts. He was then sentenced to serve

imprisonment term of twenty (20) years in respect of the first, second and fourth counts, thirty (30) years imprisonment for the fifth count and three (3) years imprisonment for the third count. The said sentences were to run concurrently.

Aggrieved by that decision, the appellant unsuccessfully appealed to the High Court where Mallaba, J. dismissed his appeal in its entirety. Undaunted, and still protesting his innocence, the appellant has knocked doors of this Court on a second appeal seeking to challenge the decision of the first appellate court. In his memorandum of appeal, the appellant raised six (6) grounds which, for reasons that will shortly come to light, we need not recite them herein.

At the hearing of the appeal, the appellant appeared in person whereas the respondent Republic was represented by Ms. Mwamini Yoram Fyeregete, learned Senior State Attorney assisted by Mr. Merito Boniphace Ukongoji, learned State Attorneys.

Before the appeal could proceed on merit, we wanted to satisfy ourselves as to whether the trial court had jurisdiction to entertain the matter. That, the certificate issued by the Director of Public Prosecutions (the DPP) conferring the jurisdiction to the trial court to try and hear the

matter was issued under the provisions of section 12 (3) of the EOCCA, while the charge involved both economic and non-economic offences. As such, we invited the parties to address us on that issue.

Upon taking the floor, Ms. Fyeregete conceded that the trial court did not have the requisite jurisdiction to try a charge which had a combination of economic and non-economic offences. Elaborating on that point, she referred us to page 7 of the record of appeal and argued that before the trial court, the appellant and his colleagues were charged with seven counts, where the sixth and seventh counts were on non-economic offences and the other four were on economic offences. She argued further that, the certificate issued by the DPP to confer jurisdiction to the trial court to entertain and hear the matter was issued under section 12(3) of the EOCCA which was not the appropriate provision of the law. It was her argument that, in the circumstances of the current appeal, the said certificate was supposed to be issued under section 12 (4) of the EOCCA and not otherwise.

She thus insisted that, since the certificate conferring jurisdiction on the subordinate court to entertain the case was issued under section 12 (3) of the EOCCA, the same was invalid and the trial court did not have the requisite jurisdiction to entertain the matter. On that account, Ms. Fyeregete

submitted that the proceedings in the trial court as well as those in the first appellate court were a nullity. She thus implored us to invoke the powers of revision bestowed upon the Court under section 4 (2) of the Appellate Jurisdiction Act, Cap. 141 R.E 2019 (the AJA) to nullify the aforesaid proceedings and the judgment of both courts below, quash the conviction and set aside the sentences meted out against the appellant.

On the way forward, Ms. Fyeregete was hesitant to press for an order for retrial on account of procedural irregularities apparent on the face of record and the weakness of the prosecution case. The learned Senior State Attorney pointed out three main irregularities committed during the trial. **First**, that, almost all the documentary evidence, including, the certificate of seizure (exhibit P1), handing over register (exhibit P5), requisition vouchers (exhibits P6 and P7) and the certificate of valuation (exhibit P9) were not read out to the appellant after they were admitted in evidence to enable him to understand their contents to properly marshal his defence. **Second,** that, the appellant's cautioned statement (exhibit P8) was unprocedurally admitted in evidence as it was recorded out of four (4) hours prescribed by sections 50 and 51 of the Criminal Procedure Act [Cap. 20 R.E. 2019] (the CPA) and there was no extension of time sought. **Third,** the statement of

the independent witness (exhibit P10) was unprocedurally admitted in evidence for failure by the prosecution to comply with the mandatory requirements stipulated under section 34B (2) (e) of the Evidence Act.

It was the submission of Ms. Fyeregete that those irregularities are critical and had weakened the prosecution case. She thus refrained from pressing for an order of retrial and instead she prayed that the appeal be allowed and the appellant be set free.

On his part, the appellant did not have much to contribute to the legal issue raised, but he agreed with the proposed way forward. On that account, he also prayed for his appeal to be allowed and that he be set at liberty.

From the submissions made by the parties, the crucial issue for our consideration is whether the certificate conferring jurisdiction on the trial court was invalid, thus rendering the entire proceedings of both courts below a nullity.

It is on record that, and as it is intimated above, the charge laid against the appellant before the trial court comprised both, economic and non-economic offences. The said charge was accompanied by a DPP's consent which was issued under section 26 (1) of the EOCCA and a certificate

conferring jurisdiction to the trial court to adjudicate the case made under section 12 (3) of the same Act.

This Court on several occasions has held 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. There are numerous authorities to this effect and some of them include, **Abdulswamadu Aziz v. Republic**, Criminal Appeal No. 180 of 2011; **Kaunguza Machemba v. Republic,** Criminal Appeal No. 157B of 2013; **Kalimilo Mahula @ Kutiga & Another v. Republic,** Criminal Appeal No. 565 of 2016 (all unreported). Specifically, in **Kaunguza Machemba** (supra) upon finding that the appellant was arraigned in court to answer a charge comprising both economic and non-economic offences and the certificate conferring jurisdiction to the subordinate court to entertain the case was issued under section 12 (3) of the EOCCA, we declared the entire proceedings a nullity.

Again, in **Mabula Mboje & 2 Others v. Republic,** Criminal Appeal No. 557 of 2016 (unreported) when faced with an akin situation, we observed that: -

> *"In view of the fact that the Certificate by the DPP...was made under section 12 (3) of the Economic and Organized*

Crimes Control Act was invalid, the subordinate court concerned was, in the circumstances, not clothed with the requisite jurisdiction to try the combination of economic and non-economic offences facing the appellants. The proceedings before it, were a nullity right from the beginning. So, were the proceedings in the first appellate court because they were rooted on nullity proceedings."

Similarly, in the instant case, there is no gainsaying that the certificate of the DPP conferring jurisdiction to the subordinate court was issued under section 12 (3) and therefore, the trial court lacked jurisdiction to adjudicate on the case. The irregularity vitiated the entire trial hence rendering the trial proceedings a nullity. So were the proceedings and judgement in the appeal before the High Court, as they stemmed from nullity proceedings.

That being the position, we hereby invoke the revisional powers under section 4 (2) of the AJA and nullify the proceedings and the judgements of both the trial court and the High Court, quash the appellant's conviction and set aside the sentences imposed on him.

On the way forward we hasten to entirely and respectfully agree with the submission by Ms. Fyeregete that this is not a fit case for us to make an order for a retrial. The articulated irregularities and unfolded deficiencies in the prosecution case shade doubts that, if the prosecution is given the

opportunity there is a likelihood of filling in gaps. Certainly, the certificate of seizure (exhibit P1), handing over register (exhibit P5), requisition vouchers (exhibits P6 and P7) and the certificate of valuation (exhibit P9) were not read out and or explained to the appellant after their admission in evidence for him to understand their contents and adequately prepare for his defence. Furthermore, the appellant's cautioned statement (exhibit P8) together with the statement of the independent witness (exhibit P10) were unprocedurally admitted in evidence for failure by the prosecution to comply with mandatory requirements under section 50 (1) (a) and (b) of the CPA and section 34B (2) (e) of the Evidence Act. It goes without saying that the failure by the prosecution to have the evidence of independent witness, had rendered the search exercise of the appellant's house invalid as there was no independent witness to corroborate the evidence of PW1 on that aspect as required by the law.

Worse enough, there were no plausible reasons offered as to why the other witness namely Beatus Maganja, who allegedly participated and witnessed the search exercise was not summoned to testify before the trial court. In the event, it was not certain as to whether the items exhibited before the trial court were the same items alleged to have been seized from

the appellant's house and cassava *shamba*. In addition, the record of the trial court is silent on the procedure used to dispose of the Government trophies alleged to have been found in the appellant's possession. In our considered view, all these are crucial matters which, as argued by Ms. Fyeregete, if an order for retrial is given will avail an opportunity to the prosecution to fill in gaps.

In the circumstances, we are increasingly of the view that a retrial order is likely to prejudice the appellant as we held in the case of **Fatehali Manji v. Republic** [1966] EA 343, at page 344, that: -

> *"...In general a retrial will 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 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 particular facts and circumstances and an order for retrial should only be made where the interests of justice require it and should not be ordered where it is likely to cause an injustice to the accused person."*** *[Emphasis added].*

Being guided by the above authority, we do not find it appropriate to order for a retrial.

In the event, we order for the immediate release of the appellant from prison unless he is held for some other lawful cause.

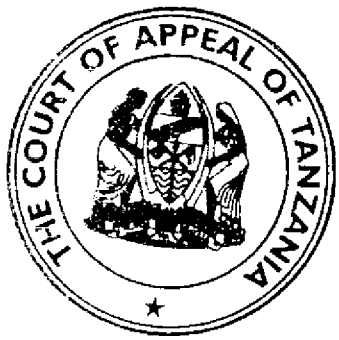
DATED at **TABORA** this 16th day of March, 2023.

S. E. A. MUGASHA
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

The Judgment delivered this 17th day of March, 2023 in the presence of Mr. Samson Amon @ Kauga the Appellant in person and Ms. Hannarose Kasambala, learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.



C. M. MAGESA
DEPUTY REGISTRAR
COURT OF APPEAL