IN THE COURT OF APPEAL OF TANZANIA
AT MUSOMA

(CORAM: MKUYE, J.A., MWANDAMBO, J.A. And MAIGE, J.A.)

CRIMINAL APPEAL NO. 364 OF 2020

CHACHA CHIWA MARUNGU ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Musoma

(Galeba, J.)

dated the 10th day of July, 2020

in

Criminal Appeal No. 5 of 2020

.....

JUDGMENT OF THE COURT

29th & 5th June, 2023

MKUYE, J.A.:

Before the District Court of Serengeti at Mugumu, the appellant Chacha Chiwa @ Marungu together with Paul Nyamhanga @ Kiroche, not subject of this appeal, were arraigned for both economic and non-economic offences in three counts, that is, unlawful entry into the game reserve contrary to section 15 (1) and (2) of the Wildlife Conservation Act No. 5 of 2009; unlawful possession of weapons in the game reserve contrary to section 17 (1) and (2) of the Wildlife Conservation Act, No. 5 of 2009 read together with paragraph 14 of the First Schedule to the Economic and Organized Crime Control Act [Cap 200 R.E. 2002] as

amended by Written Laws (Miscellaneous Amendment) Act No. 3 of 2016; and unlawful possession of government trophies contrary to section 86 (1) and (2) (c) (iii) of the Wildlife Conservation Act No. 5 of 2009 as amended by the Written Laws (Miscellaneous Amendments) Act No. 2 of 2016 read together with paragraph 14 of the First Schedule to the Economic and Organized Crime Control Act, [Cap 200 R.E 2002] as amended by Written Laws (Miscellaneous Amendment) Act No. 3 of 2016.

In the first count, it was alleged that on 24/9/2018, at Gitamwaka area in Ikorongo Game Reserve within Serengeti in Mara Region, the duo entered into the Game Reserve without the permission of the Director previously sought and obtained.

The particulars in the second count were that, the duo on the same date and place were found in possession of weapons, to wit, one panga and one knife without a permit and failed to satisfy the authorized officer that the weapons were intended to be used for the purpose other than hunting.

In the third count, it was alleged that the duo on the same date and place were found in unlawful possession of government trophies, to wit, forty dried pieces of wildebeest meat and three tails of the same

specie valued at TZS 4,251,000/=, the property of the United Republic of Tanzania.

Upon presentation of the consent of the Director of Public Prosecutions (the DPP) and certificate conferring jurisdiction to the subordinate court to try the matter, the appellant and his colleague were arraigned before the District Court of Serengeti District to answer the charges.

At the end of the trial, both were convicted and sentenced to one year imprisonment each in the 1st and 2nd counts. Regarding the 3rd count, they were sentenced to imprisonment for a term of twenty years and the sentences were ordered to run concurrently. Aggrieved by the trial court's decision, the appellant herein appealed to the High Court but his appeal was unsuccessful. Still dissatisfied, he has appealed to this Court on six grounds of appeal which for a reason to be apparent shortly, are not relevant for the disposal of the appeal.

When the appeal was called on for hearing, the appellant enjoyed the services of Mr. Cosmas Tuthuru, learned counsel, whereas the respondent Republic had the services of Mr. Abel Mwandalama, learned Principal State Attorney teaming up with Messrs. Isihaka Ibrahim and Nico Malekela, both learned State Attorneys.

At the outset, Mr. Malekela intimated to the Court supporting the appeal but on a different ground, that is, the consent and certificate of transfer of the case to be tried by a subordinate court were defective. He contended that, **one,** the consent that was filed at the District Court of Serengeti was defective since it was issued under section 26 (1) of the EOCCA which requires it to be signed by the DPP and not the Senior State Attorney. **Two,** the certificate conferring jurisdiction does not show the provisions of the law which the appellant was charged with. He elaborated that, although the appellant was charged with three counts that is, unlawful entry in the game reserve, unlawful possession of weapons in the game reserve and unlawful possession of government trophy, the consent and certificate of transfer of the case referred to paragraph 14 of the First Schedule to the EOCCA and section 15 (1) of the WCA omitting the provisions of the law mentioned in the 2nd and 3rd counts.

In this regard, he argued that the defect made the District Court to try and the learned State Attorney to prosecute the case which they did not have mandate. To fortify his argument, he referred us to the case of **Dilipkumar Maganbai Patel v. Republic,** Criminal Appeal No. 270 of 2019 (unreported), where the Court nullified the proceedings before Kisutu Resident Magistrate Court and the High Court and the decisions

thereof because the consent and certificate conferring jurisdiction on the trial court were defective for failure to refer to section 86 (1), (2) (c) (ii) and (3) of WCA cited in the charge sheet. He, ultimately, implored the Court to nullify the proceedings of both Serengeti District Court and the High Court and quash their decisions. As for the way forward, he implored the Court to order a retrial although after a short dialogue with the Court, he prayed that the interest of justice warranted the appellant's release from prison upon such nullification.

On is part, Mr. Guthuru welcomed the proposition made by the learned State Attorneys. He, thus, prayed to the Court to allow the appeal and release the appellant from prison.

We have examined and considered the submissions by both parties on this aspect and, we think, the issue for our determination from such submission is whether the trial court was properly seized with jurisdiction to try the economic offences which the appellant stood charged and convicted.

It is without question that, under section 3 (3) of the EOCCA, it is the Corruption and Economic Crimes Division of the High Court which is clothed with jurisdiction to hear and determine economic crime cases, the offences stipulated under paragraph 14 of the First Schedule to the said EOCCA inclusive. Nevertheless, the courts subordinate to the High

Court may have jurisdiction to try and determine economic crime cases if the DPP issues a certificate conferring powers to such courts to try and determine them or rather transfers such offences to be tried by subordinate courts as per section 12 (3) of the EOCCA. The said section provides as follows:

> *"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."*

Apart from that, it is important to note that there is no trial of an economic offence which can commence unless there is a consent of the DPP issued under section 26(1) of the EOCCA which stipulates as follows:

> *"(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."*

To be specific, by the time the offences were committed, the DPP was mandated to issue consent for the offences specified under Part 1 of the Schedule to the Economic Offences (Specification of Offences

Exercising Consent) Notice, 2014 (G.N. No. 284 of 2014). Nevertheless, we need to emphasize that section 26 also empowers the DPP to establish a system whereby the process of issuing the consent for prosecution of such offences may be done by specifying in the notice published in the Gazette economic offences requiring his consent in person and those which the such powers may be exercised by other officers subordinate to him.

In the case of **Omari Bakari @ Daudi v. Republic**, Criminal Appeal No. 52 of 2022 (unreported) citing its previous decision in the case of **Ramadhani Omari Mtiula v. Republic**, Criminal Appeal No 62 of 2019 (unreported), the Court stated that:

> *"Thus, without the DPP's consent and certificate, conferring the respective jurisdiction, the District Court of Serengeti embarked on a nullity to try Criminal Case No. 8 of 1995. On that account, since the first appeal stemmed from null proceedings this adversely impacted on the appeal before the High Court."*

As alluded to earlier on, in the matter at hand, the appellant was charged with three offences. In the 1st count, the offence of unlawful entry in the game reserve contrary to section 15 (1) and (2) of the WCA; the 2nd count of the offence of unlawful possession of weapons in the game reserve contrary to section 17 (1) and (2) of the WCA read

together with paragraph 14 of the First Schedule to the EOCCA; and the 3rd count of the offence of unlawful possession of Government trophies contrary to section 86 (1) and (2) (c) (iii) of WCA read together with paragraph 14 of the First Schedule to the EOCCA. That is how the provisions under which the offences were committed were cited in the charge sheet. As it is, it is clear that while the 1st count was not an economic offence, the 2nd and 3rd counts were economic offences. This means that the appellant was charged with both economic and non-economic offences.

Ordinarily, for the economic offences, they ought to have been tried and determined by the Corruption and Economic Crimes Division of the High Court. However, it would appear that, the DPP considering that there were both economic and non-economic offences which could be tried by a subordinate court, under section 12(4) of the EOCCA issued a certificate conferring jurisdiction to the District Court of Serengeti District at Mugumu to try and determine such offences. The said certificate is couched as hereunder:

> *"**CERTIFICATE CONFERRING JURISDICTION ON A SUBORDINATE COURT TO TRY AN ECONOMIC AND NON ECONOMIC CASES***
>
> *I, VALENCE S. MAYENGA, Senior State Attorney In-charge Mara Region, do hereby, in terms of section*

12(4) of the Economic and Organized Crime Control Act, [Cap. 200 R.E 2002] and G.N. No. 284 of 2014 ORDER that CHACHA s/o CHIWA @ MARUNGU and PAULO s/o NYAMHANGA @ KIROCHE who are charged for contravening the provisions of paragraph 14 of the First Schedule to the Economic and Organized Crime Control Act [Cap 200 R.E 2002] as amended by the Written Laws (Miscellaneous Amendment) Act No. 3 of 2016 and section 15 (1) and (2) of the Wildlife Conservation Act No. 5 of 2009 be tried by the District Curt of Serengeti District at Mugumu."

Dated at Musoma this 14th day of May, 2019

(Sgd)

SENIOR STATE ATTORNEY

The consent issued by the learned State Attorney In-charge was couched as follows:

"CONSENT OF STATE ATTORNEY INCHARGE

I, VALENCE S. MAYENGA, Senior State Attorney In-charge Mara Region, do hereby, in terms of section 26 (1) of the Economic and Organized Crime Control Act [Cap 200 R.E 2002] and G.N. No. 284 of 2014 CONSENT to the prosecution of CHACHA s/o CHIWA @ MARUNGU and PAULO s/o NYAMHANGA @ KIROCHE for contravening the provisions of paragraph 14 of the First Schedule to the Economic and Organized Crime

Control Act [Cap 200 R.E 2002] as amended by the Written Laws (Miscellaneous Amendment) Act no. 3 of 2016 and section 15 (1) and (2) of the Wildlife Conservation Act No. 5 of 2009, the particulars of which are stated in the charge sheet.

Dated at Musoma this 14th day of May, 2019.

(Sgd)

SENIOR STATE ATTORNEY INCHARGE."

It is vivid from the certificate of transfer and the consent that the offence that was transferred and consented for the trial was that of unlawful entry in the game reserve contrary to section 15 (1) and (2) of the WCA but which was not an economic offence. However, since the certificate was issued under section 12(4) of EOCCA, it can be deduced that it being a non-economic offence, it was covered in the certificate. The offences of unlawful possession of weapons in the game reserve and unlawful possession of government trophies under section 17(1) and (2) of WCA and section 86 (1) and (2) (c) (iii) of WCA both read together with paragraph 14 of the First Schedule to the EOCCA, which were economic offences, were neither stated in the certificate conferring jurisdiction to the subordinate court nor the consent for the trial of such offences.

Apart from that, as was rightly submitted by Mr. Malekela, in this case, the consent (page 7 of the record of appeal) was issued by Mr.

Valence S. Mayenga, Senior State Attorney under the powers conferred by section 26 (1) of the EOCCA to the DPP and not any other person. This was wrong as the power under those provisions is exercisable by the DPP in person. Mr. Mayenga ought to have exercised his powers under section 26 (2) of EOCCA read together with the Economic Offences (Specification of Offence Exercising Consent) Notice.

At any rate, as was rightly argued by the learned State Attorney, the consent issued related to the offence under section 15 (1) (2) of the WCA while the appellant was charged with the offences under sections section 17(1) and (2) of WCA and section 86 (1) and (2) (c) (iii) of WCA both read together with paragraph 14 of the First Schedule to the EOCCA. We thus, agree with both learned State Attorney and Mr. Tuthuru that the economic offences preferred against the appellant were not consented by either the DPP or his subordinate. As such, the trial against the appellant was carried out without the sanction of the DPP as required under section 26 of the EOCCA.

The above connotes that the appellant was charged, tried and convicted by the District Court of Serengeti at Mugumu without being clothed with jurisdiction to try the economic offences under sections 17 (1) and (2) and 86 (1) (2) (c) (iii) of the WCA both read together paragraph 14 of the First Schedule to the EOCCA as there was no

certificate conferring jurisdiction to it and the consent for the said offences to be prosecuted. In other words, the trial of the appellant was not sanctioned in terms of section 12(3) and 26(1) of the EOCCA.

In times without number, the Court has emphasized the need of adherence to the import of sections 12 (3) and 26 of EOCCA. That, it is very crucial for the consent and certificate conferring jurisdiction to the subordinate court to be issued by the DPP before a trial of an economic offence in a subordinate court could commence. [For instance, see **Nico Mhando and 2 Others v. Republic**, Criminal Appeal No. 332 of 2008 (unreported) and **Paulo Matheo v. Republic**, Criminal Appeal No.995 TLR 144].

Even if the said certificate and consent were made under the proper provisions of the law; sections 12(4) and 26 (2) of the EOCCA, since such consent and certificate of transfer did not make reference to the sections 17 (1) (2) and 86 (1) (2) (c) (iii) of WCA which when read together with paragraph 14 of the First Schedule to the EOCCA make them economic offences, then the said certificate and consent were incurably defective.

In this regard, the proceedings in the trial District Court in Economic Case No. 129 of 2019 and in High Court Criminal Appeal No. 5 of 2020 were a nullity because the certificate and consent in question

were incurably defective. So were the proceedings in the trial court which culminated in the conviction of the appellant and sentence was a nullity.

We therefore, in terms in section 4 (2) of the Appellate Jurisdiction Act, nullify the proceedings of the trial court, quash the conviction and set aside the sentence meted out against the appellant. Similarly, the proceedings before the first appellate court are hereby nullified, the judgment quashed and orders set aside.

Going forward, ordinarily, under such a situation a retrial would have been ideal. However, considering the circumstances of the matter, we do not think that ordering a retrial would serve the interest of justice. This is so because, the chain of custody of the government trophies which the appellant was allegedly found in possession of is not clear and the manner the inventory was issued leaves a lot to be desired. Besides that, there was no exhibit tendered in court in relation to the offences committed to support the 3rd count of unlawful possession of government trophies. On top of that, considering that the appellant has served a custodial sentence of about 3½ years since 28/11/2019 when he was sentenced, we think, the sentences of one year imprisonment for the 1st and 2nd counts suffice.

We therefore, order that the appellant be released from custody unless he is otherwise held for other lawful cause(s).

It is so ordered.

DATED at **MUSOMA** this 2nd day of June, 2023.

R. K. MKUYE
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

The Judgment delivered this 5th day of June, 2023 in the presence of the appellant in person and Ms. Magreth Fyumagwa, 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