IN THE COURT OF APPEAL OF TANZANIA

AT SHINYANGA

(CORAM: MWARIJA, J.A., KITUSI, J.A. And MGEYEKWA, J.A.)

CRIMINAL APPEAL NO. 355 OF 2020

SHENDA MUSA @ SHENDA ..... 1ST APPELLANT
MAGEMBE NTAMBI @ MASOLWA ..... 2ND APPELLANT
PANA MSINZO @ MADUHU ..... 3RD APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

[Appeal from the Ruling of the Resident Magistrate's Court of Shinyanga at Shinyanga (Extended Jurisdiction)]

(Mbuya, PRM – Ext. Jur.)

dated the 29th day of May, 2020

in

Criminal Appeal No. 41 of 2020

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JUDGMENT OF THE COURT

5th & 12th July, 2023

MWARIJA, J.A.:

The appellants, Shenda Musa @ Shenda, Magembe Ntambi @ Masolwa and Pana Msinzo @ Maduhu (the 1st – 3rd appellants respectively) were charged in the District Court of Bariadi with four counts under the Wildlife Conservation Act No. 5 of 2009 (the WCA) and

the Economic and Organized Crime Control Act, Cap 200 of the Revised Laws (the EOCCA).

In the 1st count, they were charged with unlawful entry into a game reserve contrary to section 15 (1) and (2) of the WCA; that on 17/2/2018 around 10:00 hrs, they were found at Ngoladi area, Maswa District in Simiyu Region which is within Maswa Game Reserve without any written permit from the Director of Wildlife.

In the 2nd, 3rd and 4th counts, they were charged with the offences of unlawful possession of weapons in a game reserve, unlawful hunting of scheduled animals and unlawful possession of Government trophies contrary to sections 17 (1) and (2), 47 (a) and (c) and 86 (1) (2) (c) (iii) of the WCA respectively read together with paragraph 14 of the First Schedule to and sections 57 (1) and 60 (2) and (3) of the EOCCA. It was alleged that on the same date and place as stated in the first count, the appellants were found with two knives, one machete, one bow with nine arrows, seventeen animal trapping wires and one porcupine valued at TZS 330,000.00 having been hunted without a valid licence. It was alleged further that, they were found with one skin and porcupine meat

valued at TZS 330,000.00 thus having committed the offences charged in the 2nd to 4th counts respectively.

The appellants denied all the four counts and as a result, the prosecution called three witnesses, two Game Rangers who arrested the appellants and the Game Officer who identified and conducted valuation of the Government trophy. The Game Rangers who gave evidence were, Ngelela Kazamoyo (PW1) and Remiquis Edwin Ishengoma (PW2). The substance of their evidence is that on 17/2/2018 while on patrol in Maswa Game Reserve (the Game Reserve), they noticed the presence of some people at a certain area therein. When they moved closer to that place, they saw three persons who were in the process of trapping animals. According to the witnesses, they ambushed and arrested the suspects who were later identified to be the appellants. Both PW1 and PW2 adduced that the appellants were found with the weapons, animal trapping wires and the Government trophies listed in the 2nd – 4th counts.

On his part, the Game Officer, Anthony Cosmas (PW3) gave evidence to the effect that, on 17/2/2018 he went to police station to identify and conduct valuation of the Government trophy which were

alleged to have been found in possession of the appellants. At the police station, he identified a porcupine skin and meat. He valued the same at USD 150 which was equivalent to TZS 330,000.00. He then prepared inventory form and the trophy valuation certificate which were admitted in evidence as exhibits P2 and P3 respectively.

In their defence evidence, the appellants denied all counts contending that, they were neither arrested in the game reserve nor with any of the weapons, trapping wires or the Government trophies as alleged by the prosecution witnesses. On his part, the 1st appellant (DW1) contended that, he was arrested together with his co-appellants at Ngoladi area within Batuli Village, not within the game reserve. With regard to the 2nd appellant who testified as DW2, he had no much to state in defence evidence other than adopting what was adduced by DW1. With regard to the 3rd appellant who testified as DW3, his evidence was to the effect that, he was arrested while in his farm together with the 1st and 2nd appellants weeding cotton. After their arrest, he said, they were taken to police station and later charged in court.

The trial court was satisfied that the prosecution had proved its case against the appellants beyond reasonable doubt in respect of the 1st, 2nd and 4th counts. It acted on the evidence of the three prosecution witnesses which, it found to be credible. Upon their conviction, they were each sentenced to 20 years imprisonment in respect of each of the 1st, 2nd and 4th counts and the sentences were to run concurrently. As for the 3rd count however, the learned trial Senior Resident Magistrate was of the view that, since none of the witness saw the appellants hunting the porcupine found in their possession, that count was not proved. He therefore, found them not guilty and acquitted them.

Aggrieved by the trial court's conviction and sentence in respect of the 1st, 2nd and 4th counts, the appellants appealed to the High Court. The appeal was however transferred to the Resident Magistrate's Court of Shinyanga to be heard by Mbuya, Senior Resident Magistrate in the exercise of his Extended Jurisdiction (Ext. Jur). In his judgment, the first appellate Magistrate upheld the conviction of the appellant on the 1st, 2nd and 4th counts. He was of the view that, as found by the trial court, the evidence tendered by the prosecution through the three witnesses, was credible and that, the appellants' defence did not raise any reasonable

doubt in the prosecution case. As to sentences, he agreed with the submission made by the learned State Attorney that the same was excessive as regards the 1st count, in that, whereas the punishment as provided by section 15 (2) of the WCA is a fine of not less than TZS 100,000.00 but not exceeding TZS 500,000.00 or to imprisonment of a term of not less than 1 year but not exceeding 3 years or both, the appellants were, as shown above, sentenced to imprisonment term of 20 years. He therefore, proceeded to set aside the sentence on that count and substituted thereto the sentence provided by section 15 (2) of the WCA. As for the 2nd and 4th counts, he sustained the sentence meted out by the trial court.

Notwithstanding the fact that the trial court acquitted the appellants on the 3rd count and the respondent did not cross-appeal against the acquittal, the learned first appellate Magistrate embarked on reevaluation of evidence on that count and at the end, he concluded that the evidence sufficiently proved the offence charged in that count. He proceeded to sentence each of them to an imprisonment term of 20 years, worse enough, without hearing them because, from the record,

they did not appear during the hearing of the appeal and on the date of the judgment.

The appellants were further aggrieved by the decision of the first appellate court hence this second appeal. In their joint memorandum of appeal, they have raised a total of 6 grounds which, for reasons to be apparent shortly, we need not reproduce or state their substance.

At the hearing of the appeal, the appellants appeared in person, unrepresented while the respondent Republic was represented by Mr. Shaban Mwegole, learned Senior State Attorney. Before the appeal could proceed to hearing, the learned Senior State Attorney informed the Court that he was supporting the appeal on a ground other than those raised by the appellants. He submitted that, the consent to the prosecution of the appellants which was issued by the Senior State Attorney In-Charge, Simiyu Region under section 26 (2) of the EOCCA is fatally detective because it does not specify the economic offences for which the consent was given to prosecute the appellants. For that reason, he said, the trial court lacked jurisdiction to try the appellants for the economic offences charged.

In the circumstances, relying on the Court's decision in the case of **Chacha Chiwa Marungu v. Republic,** Criminal Appeal No. 364 of 2020 (unreported), the learned Senior State Attorney urged the Court to find that, since the trial court acted without jurisdiction, the proceedings before it was a nullity and therefore, the same should be nullified, the judgment and conviction be quashed and sentences set aside. Similarly, Mr. Mwegole urged that, the proceedings of the first appellate court emanating from the proceedings of the trial court which was a nullity, should also be quashed and the judgment set aside.

On fate of the appellants, at first, Mr. Mwegole prayed for an order of retrial contending that, the prosecution tendered sufficient evidence upon which the appellants' conviction will be sustained without bringing about any other evidence. When his attention was drawn to the appellants' defence and whether the prosecution had cogent evidence proving beyond reasonable doubt that the appellants were arrested within the game reserve, the learned Senior State Attorney admitted that the crucial evidence to that effect that, the appellants were found within the geographical location of the game reserve, was lacking but

contended that the oral evidence of PW1 and PW2 is sufficient to prove that fact.

The appellants did not have any substantial submissions to make, understandably because the ground upon which the learned Senior State Attorney based his submission is one of law. The 1st appellant urged us to consider the grounds of appeal which, as stated above, were jointly filed by the appellants and allow their appeal. The 2nd and 3rd appellants adopted what was submitted by their co-appellant, the 1st appellant.

It is a correct position, as stated by the learned Senior State Attorney that, the consent of the State Attorney In-charge, Simiyu to prosecute the appellants for having committed economic crimes is invalid because, neither were the offences for which the consent was given specified nor were the breached provisions of the EOCCA mentioned. The consent reads as follows:-

> *"I, **YAMIKO ALFREDY MLEKANO,** Senior State Attorney In-charge in the Attorney General's Chambers Simiyu, **DO HEREBY** in terms of section 26 (2) of the Economic and Organized Crime Control Act [Cap. 200 R.E. 200] and by*

virtue of the Economic Offences (Specification of Officers Exercising Consent) Notice No. 284 of 2014, give my ***CONSENT*** *to the prosecution of* ***SHENDA S/O MUSA @ SHENDA, MAGEMBE S/O NTAMBI @ MASOLWA*** *and* ***PANA S/O MSINZO @ MADUHU*** *for having contravened the provision of the Economic and Organized Crime Control Act and the Schedule thereto, facts whereof are stated herein above."*

In the case of **Chacha Chiwa Marungu** (supra) cited by Mr. Mwegole, a consent was given to prosecute the appellant for the offence of unlawful entry in the game reserve contrary to section 15 (1) and (2) of the WCA, which is not an economic offence. As it turned out however, through the case which was transferred to the District Court of Serengeti at Mugumu under section 12 (4) of the EOCCA, the appellant was tried for *inter alia* the offences of unlawful possession of weapons in a game reserve contrary to section 17 (1) and (2) as well as unlawful possession of Government trophies contrary to sections 86 (1) (2) (c) (iii) both of the WCA read together with paragraph 14 of the First Schedule to and sections 57 (1) & 60 (2) and (3) of the EOCCA. Since the two economic

offences were not mentioned in the consent document, the Court held 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 Magumu without being clothed with jurisdiction to try the economic offences ... as there was no certificate conferring jurisdiction to it and the consent for the said offences to be prosecuted."*

It is obvious that the position applies to the case at hand because, in his consent document reproduced above, the learned Senior State Attorney In-charge, Simiyu did not consent to the prosecution of the two offences against the appellant in Economic Case No. 5 of 2018, which he transferred to the District Court of Bariadi for hearing. That Court did not, in effect, have jurisdiction to try the case. In the circumstances, the trial was a nullity.

With regard to the offence of unlawful entry in a game reserve, the same is not an economic offence and therefore, its prosecution required neither the consent of the DPP or his appointee nor a transfer certificate for trial by a court subordinate to the High Court under section 12 (3) of the EOCCA. Having found however, that the proceedings of the trial court which combined economic and non-economic offences were a nullity, the decision of the said non-economic offence, which arose therefrom, is equally a nullity.

On the basis of the foregoing reasons, we agree with the learned Senior State Attorney that, since the trial court acted without jurisdiction, the proceedings of both courts below should be nullified, judgments and conviction be quashed and the sentence be set aside, as we hereby do.

On the way forward, Mr. Mwegole prayed for a retrial order. The principle which guides the courts on whether or not to order a retrial was stated in the often cited case of **Fatehali Manji v. Republic** [1966] E.A. 343. In that case, the erstwhile East African Court of Appeal had this to say:-

"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 or for purposes of enabling the prosecution to fill in gaps in its evidence at the first trial ... each case must depend on its own facts and an order for retrial should only be made where the interests of justice require it."

Mr. Mwegole conceded that, apart from the evidence of PW1 and PW2 that the appellants were arrested within the game reserve and not in the 3rd appellant's farm as stated by the appellants in their defence, no evidence was led by the prosecution to establish the boundaries of the game reserve and the particular location at which the appellants were found. That omission creates a gap as regards the evidence required to prove the 2nd and 4th counts.

With regard to the evidence on the 1st count, the prosecution tendered an inventory form (exhibit P3) to prove that the appellants were found with porcupine skin and meat. The evidence of PW3, who tendered exhibit P3 was however, deficient as to whether the procedure for disposal of trophy, particularly the presence of the appellants at the time of doing so, was observed.

In the light of the above, we are of the considered view that, a retrial order is not appropriate in this case as the same will enable the prosecution to rectify the stated deficiencies in its evidence. We therefore, decline the sought order. The appellants should be released from prison forthwith unless they are otherwise lawfully held.

DATED at **SHINYANGA** this 12th day of July, 2023.

A. G. MWARIJA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

A. Z. MGEYEKWA
JUSTICE OF APPEAL

The Judgment delivered this 12th day of July, 2023 in the presence of the Appellants in person, unrepresented and Mr. Luis Boniface, learned State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.

R. W. CHAUNGU
DEPUTY REGISTRAR
COURT OF APPEAL