

IN THE COURT OF APPEAL OF TANZANIA

AT SHINYANGA

(CORAM: KOROSSO, J.A., GALEBA, J.A., And ISMAIL, J.A.)

CRIMINAL APPEAL NO. 208 OF 2021

KULWA KASHIKIAPPELLANT

VERSUS

THE REPUBLICRESPONDENT

(Appeal from the Judgment of the Resident Magistrate's Court of Shinyanga)

(Mbuya, PRM Ext. Jurisdiction)

dated the 28th day of January, 2021

in

Criminal Appeal No. 91 of 2020

.....

JUDGMENT OF THE COURT

5th & 12th December, 2023

KOROSSO, J.A.:

This is the second appeal that Kulwa Kashiki has preferred in this Court after his first appeal in the Resident Magistrate's Court of Shinyanga (Mbuya, PRM Extended Jurisdiction) was unsuccessful. To put the matter in perspective, initially, the appellant was arraigned before the District Court of Shinyanga at Shinyanga charged with two counts of unlawful possession of Government Trophy contrary to sections 86(1) and (2) (c) (iii) of the Wildlife Conservation Act, No. 5 of 2009 read together with paragraph 14 of the First Schedule to and

sections 57(1) and 60(2) of the Economic and Organized Crime Control Act (the EOCCA) in Economic Case No. 4 of 2017. In the first count, it was alleged that on 10/5/2017 at about 13.00 hours at Kagongwa area within Kahama District in Shinyanga Region, the appellant was found in possession of Government Trophy to wit, one wildebeest tail valued at USD 650.0 equivalent of Tshs. 1,452,967/50 the property of the United Republic of Tanzania without a permit from the Director of Wildlife. For the second count, it was alleged that on the same day, time and place as in the first count, the appellant was found in possession of Government Trophy to wit, one piece of serval cat skin valued at USD 300.0 equivalent of Tshs. 671,097/- the property of the United Republic of Tanzania without permit from the Director of Wildlife.

Briefly, the background to the matter as gathered from the adduced evidence is that on 10/5/2017, Inspector Maugo Msyagi (PW1) and two other police officers while in their normal duties of patrolling along Kagongwa area that included follow-up of traditional healers operating without licences, received a tip that the appellant was practicing traditional healing without licence. This led PW1 and his colleagues to the appellant's house and found him attending to

his customers. When he was asked to show his licence, the appellant was unable to offer the same not having it. The police officers proceeded with a search of his house having called an independent witness Boniface Sala (PW3) to witness. In their search, they found one tail which they suspected to be of a wildebeest, and a piece of skin which they suspected to be of a serval cat. A certificate of seizure that recorded what was seized at the appellant's premises was filled and signed by the appellant, PW1 and PW3. The appellant and the seized items were taken to the police station and the appellant was put into custody. Sometime later, the seized items were examined and analyzed by Catherine Aloyce (PW4), a wildlife officer from Kigosi Game Reserve who determined that they were Government Trophies as specified in the charge of which the appellant was tried and convicted. Dissatisfied with the conviction and sentence meted by the trial court, the appellant preferred an appeal to the High Court which was transferred to the Resident Magistrate's Court of Shinyanga before a Principal Resident Magistrate with extended jurisdiction. The said appeal was unsuccessful, hence the instant appeal to the Court.

The appellant's memorandum of appeal filed on 8/8/2021 fronts five grounds faulting the trial and the first appellate courts for the conviction and sentence imposed against him and essentially alludes to the following complaints: **One**, the impropriety of the consent of the prosecution Attorney In-charge upon its failure to specify the offence the consent relates to. **Two**, for considering PW3 was an independent witness whilst he was not, since he was not a resident of the village where the appellant resided. **Three**, failure to consider irregularities in the search and seizure at the appellant's house conducted by the police officers. **Four**, failure to consider the defence evidence, and **five**, imposing an excessive custodial sentence instead of the alternative fine provided by the law.

On the day of the hearing of the appeal, the appellant appeared in person and fended for himself, while, Ms. Suzan Masule, learned State Attorney represented the respondent Republic, assisted by Ms. Rose Kimaro, Messrs. Jukael Jairo and Goodluck Saguya learned State Attorneys.

When allowed to amplify on his grounds of appeal, the appellant prayed for his grounds of appeal to be considered and for

him to be set free and preferred to let the learned State Attorney representing the respondent Republic respond to his grounds first and that he be given leave to rejoin after that if need arises.

Mr. Jairo who took the lead in submitting for the respondent Republic commenced by conceding to the appeal. He contended that his reasons for the concession were upon discerning that the consent for the prosecution of the offences charged against the appellant was defective having failed to properly outline the specific provisions of the law for which the charged offence is based. He argued that such defects in the consent rendered it defective and thus the appellant was not properly charged for lack of proper consent within the confines of section 26(3) of the EOCCA. To augment his stance, he cited several decisions by the Court in which it has always stated that where the consent is defective it means there is no active consent against the preferred charge facing an accused person. (See, **Chacha Chiwa Marungu v. Republic**, Criminal Appeal No. 364 of 2020, **Peter Kongori Maliwa and 6 Others v. Republic**, Criminal Appeal No. 253 of 2020 and **Dilipkumar Maganbai Patel v. Republic**, Criminal Appeal No. 270 of 2019 (all unreported). Consequential to a defective consent he argued, renders the charge

defective and the trial court without jurisdiction to try and convict the person facing the defective charge and the trial becomes a nullity.

According to the learned State Attorney, apart from what he alluded to above, the other reason for conceding to the appeal was the fact that the seizure certificate exhibit P1 was improperly procured there being no evidence of a search warrant having been acquired. He contended that under those circumstances exhibit P1 should not have been accorded any value by the trial court nor relied upon by the first appellate court when affirming the appellant's conviction and sentence. He thus prayed for us to nullify the trial proceedings, quash the judgment and conviction, set aside the sentence, and set the appellant at liberty.

In rejoinder, the appellant had nothing substantive to state except to show his appreciation for the position taken by the learned State Attorney in the concession of his appeal. He urged us to grant his prayer and that in consequence, he be set free.

We have carefully considered the submissions from the appellant and the learned State Attorney who agree that the appeal before us is merited for the reason that the consent issued by the

Prosecution Attorney In-charge of Shinyanga Region made under section 26(2) of the EOCCA for the prosecution of the appellant in the case subject to the instant appeal dated 22/6/2018 and presented for filing on 7/1/2019, is defective for reasons already alluded hereinbefore. The other reason being what the learned State Attorney described as impropriety of the trial court and the first appellate court wrongly affording value and relying on the seizure certificate (exhibit P1) in the conviction of the appellant whilst it was wrongly admitted.

Noteworthy is the fact that where a person is charged with an economic offence, a trial will not commence unless there is the consent of the Director of Public Prosecutions (DPP) issued in terms of section 26(1) of the EOCCA that stipulates thus:

"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".

[Emphasis Added]

Certainly, in terms of section 26(2) of the EOCCA, the DPP is authorized to delegate his powers to officers subordinate to him. It states:

"The Director of Public Prosecutions shall establish and maintain a system whereby the process of seeking and obtaining of his consent for prosecutions may be expedited and may, for that purpose, by notice published in the Gazette specify economic offences the prosecutions of which shall require the consent of the Director of Public Prosecutions in person and those the power of consenting to the prosecution of which may be exercised by such officer or officers subordinate to him as he may specify acting in accordance with his general or special instructions".

In the case of **Chacha Chiwa Marungu v. Republic** (supra), the Court stated that the above provision empowered the DPP to establish a system for issuing consent by specifying in the notice published in the Government Gazette, economic offences requiring

his consent in person and those which such powers may be exercised by other officers subordinate to him.

We find it pertinent at this juncture to also discuss another issue which we invited the parties to address us on whether the certificate conferring jurisdiction to try the charged offence to a subordinate court was proper. Whereas the learned State Attorney conceded to the anomaly found in the said certificate, like the consent having failed to properly describe the offences charged and the provisions of law offended, the appellant left it to the Court to exercise its discretion to determine it. To be noted is that, in terms of section 3(3)(a) of the EOCCA, the jurisdiction to try offences related to wildlife as specified under paragraph 14 of the First Schedule to the EOCCA is vested before the Corruption and Economic Crimes Division of the High Court. Nevertheless, under section 12(3) of the EOCCA such offences may be tried by a subordinate court if the DPP or any other subordinate officer thereto, duly authorized by him, directs by the issuance of a certificate, that it should be tried by such subordinate court. Section 12(3) states:

"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***”.

Flowing therefrom, the law stipulates that where a person is charged with an economic offence, the consent of the DPP or an authorized assignee of his is essential and it is what confers jurisdiction for the trial of such offence. The same applies where an economic offence, duly consented is tried in a court subordinate to the one stipulated under section 3(3)(a) of the EOCCA, a certificate conferring jurisdiction on such subordinate court issued by the DPP or an authorized subordinate officer is mandatory for the conferred court to have jurisdiction to try a person charged with such offence.

In the present case, we agree with the learned State Attorney that the consent issued by the Prosecution Attorney Shinyanga Region, has a lot to be desired. We find it pertinent at this juncture to reproduce the requisite consent, it states thus:

"CONSENT OF THE PROSECUTION

ATTORNEY IN CHARGE

*MARGARET BEDER NDAWEKA, Prosecution Attorney Incharge, Shinyanga Region, do hereby, in terms of section 26(2) of the Economic and Organized Crimes Control Act [CAP 200 R.E 2002] and GN No. 284 of 2014, CONSENT to the prosecution of **KULWA S/O KASHIKI** who is charged for contravening the provisions of paragraph 14 of the first schedule to the Economic and Organised Crime Control Act [Cap 200 R.E 2002] as amended by ACT No. 3 of 2016.*

Dated at Shinyanga this 22 day of 6, 2018

Signed

MARGARETH BEDER NDAWEKA

PROSECUTION ATTORNEY IN-CHARGE".

Regarding the issued certificate conferring jurisdiction on the subordinate court to try the offence charged against the appellant, it states as follows:

**"CERTIFICATE CONFERRING
JURISDICTION ON A**

SUBORDINATE COURT TO TRY AN
ECONOMIC CASE

*I, **MARGARETH BEDER NDAWEKA**,
Prosecution Attorney In-charge Shinyanga
Region, in terms of section 12(3) of the
Economic and Organised Crime Control Act
[CAP 200 R. E 2002] and GN No. 284 of 2014
ORDER that the above named accused
person who is charged contravening the
provisions of paragraph 14 of the 1st Schedule
to the Economic and Organised Crime Control
Act [CAP 200 R. E 2002] BE TRIED by the
District Court of Kahama at Kahama.*

Signed at Shinyanga this 22 day of 6, 2018

Signed

MARGARETH BEDER NDAWEKA

PROSECUTION ATTORNEY IN CHARGE".

When going through the consent to prosecute the appellant and the certificate conferring jurisdiction to try the offence charged against the appellant above, it is important to also take into account the charge drawn against the appellant. We reproduce it. It reads as follows:

"... CHARGE ...

1st COUNT

STATEMENT OF OFFENCE: *Unlawful possession of Government Trophy c/s 86(1) and (2)(c)(iii) of the Wildlife Conservation Act No. 5 of 2009 as amended by section 59 of Act No. 2 of 2016 read together with paragraph 14 of the 1st schedule to and section 57(1) and 60(2) of the Economic and Organised Crime Control Act [CAP 200 R. E 2002].*

PARTICULARS OF OFFENCE: *That KULWA s/o KASHIKI charged on 10th day of May, 2017 at about 13.01 hrs at Kagongwa area within Kahama District in Shinyanga Region, was found in possession of Government Trophy to wit, one tail of Wildebeest valued at 650 USD equivalent to Tshs. 1,452,067/50 the property of the United Republic of Tanzania without a permit from the Director of Wildlife.*

2nd COUNT:

STATEMENT OF OFFENCE: *Unlawful possession of Government Trophy c/s 86(1)*

and (2)(c)(iii) of the Wildlife Conservation Act No. 5 of 2009 as amended by section 59 of Act No. 2 of 2016 read together with paragraph 14 of the 1st schedule to and section 57(1) and 60(2) of the Economic and Organized Crime Control Act [CAP 200 R. E 2002].

PARTICULARS OF OFFENCE: *That KULWA s/o KASHIKI charged on 10th day of May, 2017 at about 13.01 hrs at Kagongwa area within Kahama District in Shinyanga Region, was found in possession of Government Trophy to wit, one skin of Servalcat valued at 300 USD equivalent to Tshs. 671,097/= the property of the United Republic of Tanzania without a permit from the Director of Wildlife.*

Signed at Shinyanga this 30th day of November 2018

Signed

STATE ATTORNEY".

Our scrutiny of the consent to prosecute the appellant above shows that the consent was only for the prosecution of the appellant for contravening the provision of paragraph 14 of the first schedule to the EOCCA. The consent did not relate to what was specified in

the charge that is, for unlawful possession of Government Trophy c/s 86(1) and (2)(c)(iii) of the Wildlife Conservation Act No. 5 of 2009 read together with paragraph 14 of the first schedule to and section 57(1) and 60(2) of the EOCCA. Indeed, this was erroneous since paragraph 14 of the EOCCA states that:

"A person commits an offence under this paragraph who commits an offence under section 17, 19, 24, 26, 28, 47, 53, 103, 105, Part X or Part XI of the Wildlife Conservation Act or section 16 of the National Parks Act".

It follows thus that in the instant appeal, as stated by the learned State Attorney, the way the consent is drafted, there was no clarity on the specific offence the prosecution of the appellant had been consented against, thus rendering it valueless. Essentially, this means that the appellant was prosecuted without the requisite consent. The same situation befell the certificate conferring jurisdiction to the District Court of Kahama to try the charge facing the appellant. In the absence of a proper description of the offence charged in the said certificate, it means the District Court of Kahama lacked jurisdiction to try the charge against the appellant.

The Court has previously addressed such situations. In **Mhole Saguda Nyamagu v. Republic**, Criminal Appeal No. 337 of 2016 (unreported), where the case was tried by the subordinate court without proper consent of the DPP and the certificate conferring jurisdiction to it, we held:

"From the foregoing brief discussion, we are satisfied that in the absence of the DPP's consent given under section 26(1) of the Act and the requisite certificates under subsections (3) and (4) of section 12 of the Act, the trial District Court had no jurisdiction to hear and determine charges against the appellant, as it did. We further firmly hold that the purported trial of the appellant was a nullity. In similar vein, the proceedings and judgment made by the High Court dated 8/06/2016 based on null proceedings of the trial court were also a nullity".

(See also, **Ramadhani Omary Mtiula v. Republic**, Criminal Appeal No. 62 of 2019 (unreported).

It is trite that before any trial, the court must determine whether or not it is vested with the requisite jurisdiction, a stand we

have reiterated in various decisions of this Court including **Richard Julius Rukambura v. Issack Ntwa Mwakajila and Another**, Civil Application No. 3 of 2004, **Fanuel Mantiri Ng'unda v. Herman Mantiri Ng'unda and 20 Others**, Civil Appeal No. 8 of 1995 (both unreported) and **Ramadhani Omary Mtiula v. Republic** (supra).

In the circumstances, clearly without the proper consent of the DPP to prosecute the appellant and a proper certificate conferring jurisdiction to it, certainly, the District Court of Kahama's trial proceedings and decision in Economic Case No. 4 of 2017 was a nullity as correctly contended by the learned State Attorney.

In consequence, the first appeal having stemmed from null proceedings was thus similarly affected. The same fate spilled over to the proceedings and judgment of the first appellate court since it was held in **Ramadhani Omary Mtiula v. Republic** (supra); "*... a judgment in an appeal from proceedings which were a nullity is also a nullity.*"

For the foregoing, we find no need to proceed to address other complaints found in the memorandum of appeal since what we have

addressed is sufficient to dispose of the appeal. Thus, having found the proceedings of the trial and first appellate court to be a nullity, we quash the proceedings and judgment of the trial and first appellate courts. Furthermore, we quash the conviction and set aside the conviction and sentence meted to the appellant. In the circumstances, we order the immediate release of the appellant from custody unless otherwise held for other lawful purposes.


DATED at SHINYANGA this 12th day of December, 2023.

W. B. KOROSSO
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

M. K. ISMAIL
JUSTICE OF APPEAL

The Judgement delivered this 12th day of December, 2023 in the presence of the Appellant in person and Mr. Louis Boniface Mbwambo, learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.

 J. E. FOVO
DEPUTY REGISTRAR
COURT OF APPEAL