

IN THE COURT OF APPEAL OF TANZANIA
AT SHINYANGA
(CORAM: KOROSSO, J.A., GALEBA, J.A., And ISMAIL, J.A.)

CRIMINAL APPEAL NO. 211 OF 2021

MBARAKA JIMWAGA @ KARUMBETE1ST APPELLANT
MABULA MBOJE MADUHU2ND APPELLANT
MAGEMBE SAYI @ MADUHU3RD APPELLANT
KARINGA GAMBANADU BUYEYE4TH APPELLANT
MAHEGA NGULI5TH APPELLANT
MAHENYELA BAHAME6TH APPELLANT

VERSUS

THE REPUBLICRESPONDENT
(Appeal from the judgment of the Resident Magistrates' Court of Shinyanga at
Shinyanga (Extended Jurisdiction)

(Mbuya, PRM (Ext. Jur.))

dated 8th day of March, 2021

in

DC Criminal Appeal No. 93 of 2020

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JUDGMENT OF THE COURT

6th & 13th December, 2023

ISMAIL, J.A.:

This is a second appeal. It represents the appellant's disgruntlement, yet again, this time with the decision of the Resident Magistrates' Court of Shinyanga (Mbuya, PRM with Extended Jurisdiction) (the first appellate Court) in DC. Criminal Appeal No. 93 of 2020. In a decision delivered on 8th

March, 2021, the first appellate Court found nothing meritorious in the appeal preferred by the appellants, choosing instead to dismiss it and uphold their conviction. With respect to sentence, the first appellate court varied the sentence by enhancing it to 20 years' prison term in some of the counts in respect of which a 12-month custodial sentence which had been imposed by the trial court.

The appeal proceedings in the first appellate court stemmed from the decision of the District Court of Bariadi at Bariadi in which the appellants were arraigned on 20 assorted counts comprised in a charge sheet that founded Economic Case No. 96 of 2016. The offences were clustered into four categories. These are: Unlawful entry into a game reserve; unlawful possession of weapons in a game reserve; unlawful hunting of scheduled animals; and unlawful possession of Government trophies.

With the exception of the offence of unlawful entry into a game reserve which was charged under the provisions of section 15 (1) and (2) of the Wildlife Conservation Act (WCA), together with Government Notice No. 275 of 1974, the rest of the counts (19 counts) were charged under the provisions of sections 57 (1) and 60 (2) and (3) of the Economic and Organized Crime Control Act (the EOCCA), as amended by sections 13 and 16 of the Written Laws (Miscellaneous Amendments) Act No. 3 of 2016. This

means that, effectively, 19 counts out of 20 were economic offences whose charging requires consent of the Director of Public Prosecutions (the DPP). Alongside the EOCCA provisions, the provisions of the WCA were also brought into effect.

The offences were allegedly committed on 17th December, 2016 at around 13:00 hours at Longalambogo area which is part of Maswa Game Reserve in Itilima District within Simiyu Region. The appellants were alleged to have entered into the game reserve, conducted some hunting and killed assorted animals. Their hunting spoils, known in legal parlance as Government trophies were allegedly found in their possession.

Completion of investigation saw them arraigned in the District Court of Bariadi District where they pleaded not guilty to the charges. Notably, institution of the proceedings was followed by the issuance of Consent of the State Attorney In-charge in the National Prosecution Service in Simiyu. The issuance of the said instrument, a prerequisite of section 26 (2) of the EOCCA, signaled the DPP's assent to the prosecution of the accused persons (now the appellants) in respect of offences which also included economic offences. As it shall be apparent in a moment, the legitimacy of the consent will be the subject matter of decisive importance. Simultaneously, the Prosecution Attorney In-charge issued a certificate that conferred

jurisdiction on the District Court of Bariadi at Bariadi to try the appellants on the offences with which they stood charged.

As alluded earlier on, the trial court was convinced that the guilt of the appellants had been established, warranting passing of a conviction that handed them a custodial sentence for 20 years. The appellants' effort to overturn the conviction and sentence fell through when their appeal to the High Court brought more misery as sentences in some of the counts were enhanced to 20 years on the ground that the trial court overlooked the fact that some counts carried economic offences against which the prescribed sentence is 20 years' prison term.

Still aggrieved by the High Court's decision, the appellants are before us, seeking to fault the lower courts' findings. Five grounds of appeal have been raised as contained in the Memorandum of Appeal filed on 12th August, 2021. Again, for reasons that will come to light shortly we find that need does not arise for reproduction of the said grounds of appeal in this judgment.

Hearing of the appeal pitted the appellants who fended for themselves, unrepresented, against Ms. Suzan Masule and Ms. Violeth Mushumbusi, both learned State Attorneys, for the respondent Republic. At

the instance of the appellant, we allowed the learned State Attorney to address us first while the appellants would come in after that.

When Ms. Masule rose to address the Court, she expressed her support to the appeal. The learned State Attorney argued that, whilst the appellants have found faults in the certificate that conferred jurisdiction on the trial District Court to try the matter, she was seriously concerned with the consent instrument. Ms. Masule submitted that the consent issued by the DPP is flawed in that it has not specified offences with which the appellants were charged. This meant, she argued, the trial court was not sanctioned, and that the 1st appellate court slipped into an error when it entertained an appeal which emanates from proceedings which were a nullity. She argued that even the proceedings of the first appellate court are also a nullity. To buttress her contention, she referred us to the Court's decision in **Chacha Chiwa Marungu v. Republic**, Criminal Appeal No. 364 of 2020 (unreported), in which a similar anomaly was abhorred and the proceedings were adjudged a nullity. Ms. Masule implored us to take that path in the instant proceedings.

For their part, the appellants had nothing useful to submit. They only prayed that their grounds of appeal be adopted and that their appeal be allowed.

These brief uncontested submissions have narrowed our focus and the only issue for determination rests on the validity of the consent and the way forward.

It is common knowledge that commencement of the trial proceedings in economic cases comes after issuance of consent by the DPP. Powers of the DPP in that respect are statutory and the relevant provision in that regard is section 26 (1) of the EOCCA, whose substance we feel apt to reproduce. It stipulates as follows:

"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".

Notably, powers of the DPP under subsection (1) can be devolved to cover officers operating under him, in terms of subsection (2) thereof. Our dispassionate review of the instrument, christened "*CONSENT OF THE PROSECUTION ATTORNEY IN-CHARGE*" which appears at page 23 of the record of appeal was undoubtedly issued pursuant to subsection 2 of section 26 of the EOCCA.

To appreciate the import of Ms. Masule's concession and our misgivings on the validity of the said consent, it is apposite that we reproduce the said instrument, as hereunder:

**"CONSENT OF THE PROSECUTION
ATTORNEY IN-CHARGE**

*I, **GRACE N. MPATILI**, Prosecution 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. 2002] and by virtue of the Economic Offences (Specification of Officers Exercising Consent) Notice No. 294 of 2014, give my **CONSENT** to the prosecution of **MBARAKA S/O JIMWAGA @ KARUMBETE, MABULA S/O MBOJE @ MADUHU, MAGEMBE S/O SAYI @ MADUHU, KARINGA S/O GAMBANADU @ BUYEYE, MAHEGA S/O NGULI, MAHENYELA S/O BAHAME and NINDWA S/O MLEKWA @ MASUNGA** for having contravened the provisions of the Economic and Organized Control Crime Act and the Schedule thereto, facts whereof are stated herein above.*

SIGNED at BARIADI this 11th day of March 2017.

(Sgd)

Grace N. Mpatili

PROSECUTION ATTORNEY IN-CHARGE".

Glancing through the purported consent by the Prosecution Attorney In-Charge it is clearly discernible that the same embodied no specification of what the appellant were charged with, specifically the economic offences in respect of which consent was issued. Besides, the broad statement "*for having contravened the provisions of the Economic and Organized Control Crime Act and the Schedule thereto, facts whereof are stated herein above*" which appear at the foot of the instrument, without clarity of what the charges were, in the form of specified offences, was given a wide berth with an unidentified boundary. In our considered view, this is an erroneous indulgence. It is an omission of a fatal effect which has a bearing on the legitimacy or competence of the trial proceedings and those of the appeal that emanated therefrom.

The Court encountered a similar challenge in the case of **Rhobi Marwa Mgare & 2 Others v. Republic**, Criminal Appeal No. 192 of 2005 (unreported). It observed in that case, as follows:

"It follows that in the absence of the DPP's consent and certificate of transfer of the economic offence

to be tried by Tarime District Court, in terms of section 12 (3) and 26 (1) of the Act, the subordinate Court had no jurisdiction to try the case. The trial was thus a nullity and the ensuing conviction and sentences are nothing but nullities. Even the proceedings before the High Court on first appeal were a nullity”.

A stance akin to the foregoing was taken in the most recent decision of **Kulwa Kashiki v. Republic**, Criminal Appeal No. 208 of 2021 (unreported), in which we quoted an excerpt from **Mhole Saguda Nyamagu v. Republic**, Criminal Appeal No. 337 of 2016 (unreported), in the latter of which proceedings were founded on a defective consent and a certificate conferring jurisdiction were nullified. As it did that, the Court remarked as follows:

"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: **Peter Kongori Maliwa & 6 Others v. Republic**, Criminal Appeal No. 253 of 2020; **Jumanne Leonard Nagana & 2 Others v. Republic**, Criminal Appeal No. 515 of 2019; **Malegi Shenye @ Lusinga v. Republic**, Criminal Appeal No. 152 of 2020; and **Dilipkumar Maganbai Patel v. Republic**, Criminal Appeal No. 270 of 2019 (all unreported).

The holding in the quoted holdings of the Court represent what we consider to be the way forward in this. We are of the firm view that circumstances of this case in which the proceedings are laden with other substantive and procedural irregularities, including the broken chain of custody, absence of seizure certificate and, in some cases, failure to label the exhibits, favour a conclusion that this appeal ought to be allowed. In any case, it is settled law that the remedy of retrial cannot be considered where, as is the case here, there is no proper charge.

Since the discussed point of law is sufficient to dispose of the appeal, we find undesirable to dwell on the grounds of appeal, as doing so would only amount to a wasted effort.

Consequently, we allow the appeal and nullify the proceedings, quash the conviction and set aside the sentence. We further order that all the six appellants be immediately released from prison unless held for other lawful causes.

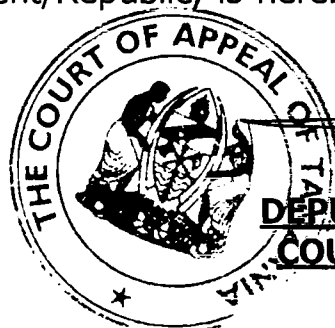
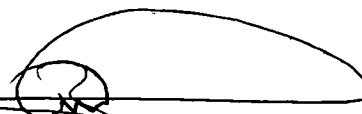
DATED at **SHINYANGA** this 12th day of December, 2023.

W. B. KOROSSO
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

M. K. ISMAIL
JUSTICE OF APPEAL

The Judgement delivered this 13th day of December, 2023 in the presence of the 1st, 2nd, 3rd, 4th, 5th, and 6th Appellants 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