

**IN THE HIGH COURT OF TANZANIA
AT ARUSHA**

CRIMINAL APPEAL NO. 110 OF 2014

*(ORIGINATING FROM THE DISTRICT COURT OF KARATU IN CR. CASE
NO.01/2014)*

KASI MARGWE.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT ON APPEAL

S.M.MAGHIMBI, J

This is judgment on criminal appeal No. 110 of 2014 whereas the appellant one Kasi Margwe being aggrieved by the decision of the District Court of Karatu in Criminal case No. 01/2014 hereby appeals to this Court against both the conviction and sentence imposed on him. At the trial, the appellant was accused of having committed the offence of being in unlawful possession of Government trophy c/s 85(2) (d) of the Wildlife Conservation Act, No. 5 of 2009 to be read together with paragraph 14 (d) of the first schedule of the Economic and Organised Crimes Control Act, Cap 200 R.E 2002.

At the trial it was alleged that on the 31st day of December, 2013 at about 1200 hours in Endamagha village within Karatu District, Arusha region the accused found in unlawful possession of dikdik valued at TZS 4,037,500/- the property of Tanzania Government. The appellant was found guilty of the offence and was sentenced to serve twenty years of imprisonment or pay a fine of TZS 4,037,500/-

In his appeal the appellant raised two grounds of appeal that the trial magistrate erred in law and in fact by not complying with the sections 235(1) of the Criminal Procedure Act, Cap 20 R.E 2002 and that the District Court of Karatu which tried the case was not vested with jurisdiction to try it. The appeal was orally heard.

On the day of the hearing the appellant submitted that he was found at his house at 12.00 noon by two game police and one ordinary policeman, he was then taken to police custody and was kept there one day and the next day he was taken to Karatu District Court and was taken to custody. He submitted further that he was found with goat meat but wrongly accused that it was dikdik meat which was never taken to Court as exhibit. He was then sentenced to 20 years imprisonment.

On reply, Ms. Lucas learned State Attorney representing the respondent submitted that the respondent support the appeal due to the fact that the Court who tried the case was not vested with jurisdiction to try the case. That the appellant was charged with the offence of being in unlawful possession of government trophy c/s 86(1) of the Wildlife Conservation Act, No. 5 of 2009 read together with para 14(d) of the Economic and Organised Crimes Control Act, Cap 200 RE 2002 which in principle, this case is not a normal criminal case but an economic case which in law u/s 3 of Cap 200 the Court vested with jurisdiction is the High Court. Furthermore, Section 12(3) of the same Act provides that the lower courts may proceed to hear the case with the consent of the DPP or State Attorney authorised to do so, this was not the case at the trial, the Court proceeded to hear the case without having any jurisdiction. For the reason that the Court did not have jurisdiction, the proceedings were a nullity and

have no effect. The remedy available is to apply for the case to be retried as per the provisions of Section 388(1) of the Criminal Procedure Act. Ms. Lucas argued further that however the law also said in applying for a denovo hearing, the party should see if there will be any failure of justice. She hence argued that looking at the evidence at the trial Court if it warrants an order for retrial by this Court, the evidence is very doubtful hence give the benefit of doubt to the appellant. To support her argument, Ms. Lucas cited the case of Selemani Makumba Vs. the Republic, in 2006 TLR 206 where it was held that "*doubt however slightly should be solved in favour of the accused person*". That the doubts in this case include that the accused was arrested with dikdik meat, to prove such a case, inventory report to show that the exhibit was produced in court was indispensable, an inventory which was never admitted at the trial court.

Ms. Lucas argued further that according to the Section 114 (3) of the Wildlife Conservation Act (Supra) the valuation report for valuing the trophy is to be prepared by Director of Wildlife Life Officer of the rank of Wild Life Officer but the report admitted at the trial was filled by conservator of Ngorongoro Conservation Area Authority. Further that the way the meat was produced in Court is also doubtful hence even if the respondent applies for trial denovo chances of success are minimal.

Ms. Lucas submitted further that the sentence imposed on the appellant is very severe because Section 86 (1) (2) (a) of the Wildlife Conservation Act (Supra) provides that "*where a trophy which is the subject matter of the charged or any part of the trophy is part of animal specified in parts I of the first schedule to this Act and the value of the trophy does not exceed 100,000/- to imprisonment if a term of not less than 5 years but not*

exceeding 15 years or to a fine of not less than twice the value of the trophy or to both." Ms. Lucas argued that the animal in question falls in part I of the schedule. She hence concluded by saying that the respondent support the appeal.

Having heard the parties and after going through the file, I will address this appeal by first disposing off the second ground of appeal which is on the jurisdiction of the Court to try the matter owing to the fact that should this argument test positive, then the whole proceedings of the trial Court are a nullity..

It was the respondent who conspicuously addressed the issue of jurisdiction. She argued that the appellant was charged with the offence of being in unlawful possession of government trophy c/s 86(1) of the Wildlife Conservation Act, No. 5 of 2009 read together with para 14(d) of the Economic and Organised Crimes Control Act, Cap 200 RE 2002 which in principle, this case is not a normal criminal case but an economic case which in law u/s 3 of Cap 200 the Court vested with jurisdiction is the High Court. Furthermore, Section 12(3) of the same Act provides that the lower courts may proceed to hear the case with the consent of the DPP or State Attorney authorised to do so, this was not the case at the trial, the Court proceeded to hear the case without having any jurisdiction.

Before I proceed to determine this question, I must as well comment in passing on the defectiveness of the charge that the appellant was charged with at the trial. The charge sheet reads that "*unlawfully possession of government trophy c/s 86(1) (b) of the Wildlife Conservation Act No. 5 of 2009.....*" and that has been the section that the conviction of the appellant (then accused) was based on. I have gone through the charge sheet and

have seen no such section as section 86(1) (b). The implication here is that the charge sheet that the accused was charged with was defective. However it is trite that an error in the depiction of the statutory provision under which the charge is brought does not have the effect of rendering the proceedings void *ab initio*. The court are directed to exercise the power to amend such a defective charge where the amendment is in the interests of justice in situations that such the amendment will not have the effect of charging a different offence. Having said that, I will address the appeal assuming that the prosecution meant to charge the appellant with the offence under Section 86(2) (b) of the Wildlife Conservation Act No. 5 of 2009.

Going back to the argument of Ms. Lucas, I am in entire agreement with her that the offence that the appellant was charged with falls squarely under the First Schedule of the Economic and Organised Crimes Control Act, Cap 200 RE 2002 hence under the jurisdiction of the High Court. The record of the trial Court reads "In the District Court of Karatu at Karatu. Criminal Case No.01/2014" and that is the case that is appealed against in this Court. It is clear in this title that the trial Court was sitting as the District Court hearing an ordinary criminal case and not Economic Court hearing an Economic Case.

Assuming that we were to rely on the provisions of Section 12(3) of Cap. 200 which provides that lower courts may proceed to hear the case with the consent of the Director of Public Prosecution or State Attorney authorised to do so, unfortunately the mandatory requirement of the provision was not fulfilled. On the record, there is no any evidence to show that the consent was given. I have considered many decisions of the Court

of Appeal on the issue of jurisdiction including the case of Elias Vitus Ndimbo & Another Vs The Republic (Criminal Appeal No. 272 Of 2007.); Kaganda John & Anor v R, Criminal Appeal No. 356 of 2009; Dotto Salum @Butwa vs R, Criminal Appeal No. 5/2007; Nicco Mhando & 2 Others v R, Criminal Appeal No. 332 of 2008 (all unreported) to name a few.

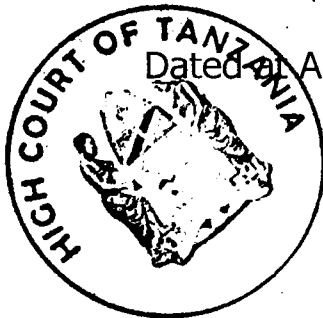
Having said that, it is therefore evident that the trial court proceeded to determine a matter that it did not have jurisdiction. For that reason, the proceedings of the District Court were illegal for lack of jurisdiction. Hence the proceedings, judgment, conviction and sentence of the trial court are declared illegal and a nullity. Consequently, I quash the proceedings in the District court and set aside the sentence. After reaching into the above conclusion, I do not think I need to dwell on the first ground of appeal.

Addressing the question of retrial raised by the respondent whereby Ms. Lucas argued that the remedy available is to apply for the case to be retried as per the provisions of Section 388(1) of the Criminal Procedure Act whereby she argued that looking at the evidence at the trial Court if it warrants an order for retrial by this Court, the evidence is very doubtful hence the benefit of doubt should be given to the appellant. Ms. Lucas cited the case of Selemani Makumba Vs. the Republic, in 2006 TLR 206 where it was held that "*doubt however slightly should be solved in favour of the accused person*". With due respect to Ms. Lucas, I do not think she is the proper person to decide where there should or should not be a retrial. As it has been said above, Section 12(3) of the Cap. 200 provide that the lower courts may proceed to hear the case with the consent of the DPP or State Attorney authorised to do so. It has not been shown by Ms. Lucas whether she was authorised to make any decision on the issue of

retrial. I base my opinion in the decision of the Court of Appeal sitting at Iringa in Criminal Appeal No.272 of 2007 between Elias Vitus Ndimbo & Another Vs The Republic (Unreported) where it was held that "*As to whether the appellants are to be subjected to a retrial or not, **we leave it to the discretion of the Director of Public Prosecution** in the exercise of his powers under Article 59B(2) of the Constitution of the United Republic of Tanzania, Cap.2 R.E.2002.*" The decision on whether the matter should be retried or not is left upon the Director of Public Prosecution or State Attorney authorized to do so.

In the meantime, I hereby order immediate release of the appellant from custody unless otherwise lawfully held.

Appeal allowed.



Dated at Arusha this 21st day of April, 2015

SGD

S.M. MAGHIMBI

JUDGE

I hereby certify this to be a true copy of the original.


Deputy Registrar

High Court

Arusha

20/8/15