

IN THE HIGH COURT OF TANZANIA
MUSOMA DISTRICT REGISTRY
AT MUSOMA
CRIMINAL APPEAL NO 14 OF 2020
SAMSON NYAMHANGA @ MAKURU _____ **APPELLANT**
VERSUS
THE REPUBLIC _____ **RESPONDENT**

(Arising from the decision and orders of the district court of Serengeti at Mugumu, Hon. Ngaile RM in economic case no 44 of 2016 dated 28.08.2017)

JUDGEMENT

Date of last order; 23.06.2020
Date of Judgment; 03.07.2020

GALEBA, J.

The appellant in this appeal is challenging the decision of the district court of Serengeti in economic case no 44 of 2016 in which he was charged on five counts contrary to various provisions of the wildlife conservation laws. Specifically, on the 1st count he was charged for unlawfully entering in the national park contrary to **Sections 21(1)(a) and (2) and 29(1) of the National Parks Act [Cap 282 RE 2002]** as amended by the **Written Laws (Miscellaneous Amendments) Act No. 11 of 2003** (the NPA). On the 2nd count he was charged for unlawful possession of 1 bow, 1 arrow, 1 knife and 6 animal trapping wires in the national park contrary to **Section 24(1)(b) and (2) of the NPA**. On the 3rd, 4th and 5th counts the appellant was charged on account of unlawful possession of 18 pieces of dried meat of a buffalo, 2 pieces

of dried skin of warthog and four legs of Impala respectively. Offences on account of the 3rd, 4th and 5th counts were all allegedly committed contrary to **Section 86(1) and (2) (c) (i) (ii) of the Wildlife Conservation Act, No 5 of 2009** (the WCA) read together with paragraph **14(d) of the first schedule to and sections 57(1) and 60(2) of the Economic and Organized Crime Control Act, [Cap 200 RE 2002]** (the EOCA). According to the prosecution all the 5 offences were committed at 11.00 hours on 08.08.2017 at Milima Nyaruboru within the Serengeti national park in Serengeti district Mara region.

The appellant was sentenced to 1 and 2 years in respect of the 1st and 2nd counts respectively and in respect of the 3rd, 4th and 5th counts the appellant was sentenced to serve 25 years imprisonment for each of the 3 counts. The sentences were to be served concurrently. In this appeal the appellant is challenging not only his conviction but the sentences imposed upon him. He raised 7 substantive grounds of appeal, but for reasons that will be apparent momentarily, I will not get into any of the grounds.

When I was preparing for hearing of this appeal, I noted that the certificate conferring jurisdiction onto the trial district court was drawn under section 12(3) of the EOCA. The charge against the appellant having a combination of economic and noneconomic offences I asked Mr. Yese Temba learned state attorney for the respondent, if the trial court had jurisdiction to try the case in the first place.

Mr. Temba readily conceded that, in such circumstances, the trial court had no jurisdiction to try the case. He submitted that in appropriate circumstances he would have prayed for a retrial but looking at what happened in the trial court he would not move this court in that direction. In amplifying his point on the same aspect he stated that the trophy valuation certificate (**EXHIBIT PE3**) was not read in court and he moved this court to expunge it from the record because the same was improperly received. He submitted that having expunged the exhibit, this court shall have to set aside the sentences in respect of unlawful possession of government trophies. Finally he submitted that because the appellant has stayed in jail since 2016, this court be pleased to acquit him. The appellant had nothing to add to Mr. Temba's submission.

As indicated above, the charge facing the appellant was containing a combination of economic and noneconomic crimes. That is, whereas the offences in the 1st and 2nd counts were noneconomic offences, those in the 3rd to the 5th counts were economic offences in terms of paragraph 14 of the first schedule to the EOCA.

Legally, when a charge contains both economic and noneconomic offences, the certificate to confer jurisdiction upon a subordinate court to try the case must be issued under section 12(4) and not 12(3) of the EOCA as it was done by the prosecution in this case. What was done was erroneous and illegal which means economic

case No 44 of 2016 was tried by the district court of Serengeti without jurisdiction to try it. Having held as such what should then be done in the circumstances? Mr. Temba submitted that as the trophy valuation was illegally tendered he cannot pray for retrial. I think that was a proper and a courageous submission.

In **CRIMINAL APPEAL NO 337 OF 2016 BETWEEN MHOLE SANGUDA NYAMAGU VERSUS REPUBLIC (CA-MWANZA-UNREPORTED)**, in providing for the status when that happens, at pages 13 to 14, the Court of Appeal held that;

"We wish to point out here that in the absence of a proper certificate issued under section 12(4) of the Act, it was inappropriate for the appellant to be prosecuted in respect of an economic crime in conjunction with a noneconomic crime. As, rightly argued by the learned Senior State Attorney, the appellant was tried in violation of section 12(4) of the Act."

Very recently in March 2020 in **CRIMINAL APPEAL NO 324 OF 2017, SAIDI LYANGUBI VERSUS THE REPUBLIC CA AT DAR ES SALAAM (UNREPORTED)** at page 11 of the typed judgment the Court of Appeal held that;

"As was rightly argued by Mr. Katuga, this is not the first time section 12(3) and 12(4) of the Act is coming under proper scrutiny in this Court. It was a subject of discussion in the cited case of Kaunguza Machemba vs The Republic (supra). In that case the appellant was arraigned in court to answer a charge comprising both economic and non-economic offences and the certificate conferring jurisdiction to try the case to the Shinyanga Resident Magistrates Court was issued under section 12(3) of the Act. The trial was declared a nullity by the Court."

It is therefore clear that the consequences in our case, like in the above appeals, are to nullify the trial. After declaring the trial a nullity

the next following step is either to order an **acquittal** or trial **de novo**. I appreciate Mr. Temba's courage in submitting that he would not press for a retrial but let me add a little bit; whether or not to order a trial **de novo** the principle to follow is that which is contained in **FETAHALI V R (1966) EA 343** that;

"....each case must depend on its own facts and an order for retrial should only be made where the interest of justice requires".

Courts have always refused a retrial where there is no credible evidence necessary to lead to a valid conviction. See the decisions in **CRIMINAL APPEAL NO. 200 OF 2006, SHABANI IDDI JOLOLO AND 3 OTHERS VERSUS THE REPUBLIC CA DODOMA (UNREPORTED)** and **CRIMINAL APPEAL NO 206 OF 2017 ERNEO KIDILO AND MATATIZO MKENZA VERSUS REPUBLIC CA MTWARA, (JUMA CJ, MZIRAY JA AND MKUYE JA) (UNREPORTED)**. For instance in **ERNEO KIDILO** a prayer for retrial was refused because the trophy valuation certificate, the inventory form and the appellants' confession statements were all missing from the file.

In this case, the trophy valuation, the document which identifies the specie of the animals to court was improperly tendered, so I cannot allow retrial because if I allow it, the prosecution will go tender it and read it which means they will fill in the gaps to achieve a valid conviction which would be illegal.

This appeal calls for what Mr. Temba summited and finally prayed. He submitted that the trial court had no jurisdiction and retrial is

impossible because **EXHIBIT PE3** was improperly admitted. He prayed that I acquit the appellant. I think that is a proper course to follow.

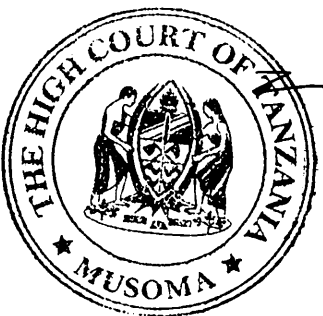
Based on the above discussion, this court acquits the appellant **MR. SAMSON NYAMHANGA MAKURU** of all the 5 counts contained in the charge sheet because of an illegal trial of economic case No 44 of 2016. Consequently the appellant should be released from prison and set to liberty unless he is lawfully held.

DATED at MUSOMA this 3rd July 2020



Z. N. Galeba
JUDGE
03.07.2020

Court; This judgment has been delivered today the 3rd July 2020 in the absence of parties but with leave not to enter appearance in following a medical warning to maintain social distance between individuals.



Z. N. Galeba
JUDGE
03.07.2020